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No. 515

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,
Petitioner,

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENT

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SOUTHERN UTE TRIBE OR BAND OF INDIANS,
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BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. May the United States avoid an obligation to pay the Southern Ute Tribe for approximately 230,000 acres of land within the Southern Ute Reservation taken in violation of the Act of 1895 on the basis of the government's assertion that the Southern Ute Reservation was among land unqualifiedly ceded to the United States by the Confederated Bands of Ute Indians by the Act of 1880, and allegedly included in a stipulation in 1950 settling other litigation between the Confederated Bands of Ute Indians and the United States?

2. When the United States admits responsibility to account for the trust proceeds from the disposal of approximately 82,000 acres of Southern Ute lands, is it not also responsible to account properly and completely for the management of the proceeds, particularly where the Southern Ute Tribe, as beneficiary, has not had such an accounting until this suit was filed?

3. When the United States admits it is responsible for an accounting of the trust funds of the Southern Utes, is it not obliged to account for its handling of any such proceeds from receipt until the date of judgment in the instant proceeding, particularly where the accounting and provable wrongdoings involve activities which began and accrued prior to 1946 and continue down to date?

STATEMENT OF THE CASE

I. Agreements and Acts Affecting the Southern Utes

For a long time prior to 1868, the Confederated Bands of Ute Indians, a confederation of the Uncompahgre (formerly Tabequache), White River (formerly Yampa and Grand River), and Southern and Ute Mountain Ute (collectively referred to as Southern Utes and sometimes designated as Capote, Muache and Weeminuche),[1] occupied an extensive region which spanned western Colorado, northern New Mexico and parts of Utah. A.69-70. By the Treaty of March 2, 1868 (15 Stat. 619), the Confederated Utes agreed to cede to the United States a portion of their aboriginal lands, reserving for themselves a reservation in western Colorado approximating 15,700,000 acres.[2]

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[1] *Confederated Bands of Ute Indians* v. *United States*, 100 C.Cls. 413, 415.

[2] This reservation consisted of the areas indicated by Charles C. Royce, *Indian Land Cessions in the United States*, Colorado 1 (18th Ann. Rep., B.A.E. 1896-1897, Part II), as Areas 616, 566 and 617. Area 566 was the Brunot Cession, 616 the area ceded by

Subsequent discovery of large and valuable mineral deposits on the Confederated Ute Reservation prompted the United States to persuade the Confederated Bands to cede approximately 3.7 million acres of the east-central portion of their reservation. This became known as the Brunot Cession of 1873.[3]

Except for the Brunot Cession, which virtually severed the original 1868 reservation into two disproportionate parts, the Confederated Bands of Utes continued to occupy their reservation in western Colorado, the White Rivers occupying generally the northern sector of the reservation, the Uncompahgres the central portion, and the Southern Utes the southern portion.[4] The so-called "Meeker massacre," in which Indian Agent Meeker and others were killed by White River Utes in 1879, led the United States to negotiate with the Confederated Bands

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the Act of 1880, and 617 was the Southern Ute Reservation in suit. See Appendix A to respondent's opposition to the petition for a writ of certiorari.

[3] A. 70. The Southern Utes, when approached by a Commission appointed pursuant to the Act of May 3, 1878 (ch. 87, 20 Stat. 48), the purpose of which was to consolidate all Ute agencies on the White River, claimed they had been overreached in such negotiations and refused to move to White River. Annual Report, Commissioner of Indian Affairs, 1879, p. 171 (hereafter cited "CIA 18—").

[4] Article IV, Section 1, of the 1874 Act obligated the United States to "establish an agency" for the Southern Utes "on the southern part of the Ute reservation." 18 Stat. 36, 37. The United States complied and kept the agency staffed. The report of the Agent for the Southern Utes dated August 28, 1879, for instance, includes this:

> "That portion of the Ute tribe known as *Southern Utes*, . . . are located on the Southern Ute Reservation, in the south western part of Colorado, bordering on New Mexico." CIA 1879, p. 16. (Emphasis in original).

The Agent went on to explain that the agency buildings were located on the Rio Los Pinos, east of the La Plata River. *Id.*, at 17. Except for a 20-mile strip between the Utah border and the Brunot Cession, the Southern Utes were cut off from the White Rivers and Uncompahgres to the north. A. 70.

of Utes for a cession of their diminished 1868 reservation and removal to other areas.[5] An agreement was reached and ratified by the Act of Congress of June 15, 1880, 21 Stat. 199. The record of the ratification by the Indians explains that the Act ceded "all right, title, interest, and claim . . . *excepting and reserving such lands* on the La Plata River" and near the mouth of the Gunnison as required for the Southern and Uncompahgre Utes.[6]

Under that Agreement, A. 70-71, which was later accepted by the required vote of three-quarters of the adult male Utes:

(1) The Confederated Bands "ceded" to the United States "all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement."

> "The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.
>
> "The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.
>
> "The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah." (21 Stat. 199, 200).

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[5] The negotiations were with a delegation of Utes brought to Washington for that purpose.

[6] CIA 1881, p. 208. Emphasis is supplied throughout this brief unless otherwise indicated.

(2) A Commission to be appointed was to take a careful census of the Indians, separating them as to Southern Utes, Uncompahgre Utes and White River Utes.

(3) Allotments in severalty to individual Utes were to be made after preparation of the census and completion of the surveys in the vicinities named in the agreement.

(4) The remainder of the ceded lands were to be subject to cash entry only in accordance with then existing law.

Shortly after the Act of 1880 was accepted by the required number of Utes, the Ute Commission under the Chairmanship of George W. Manypenny was formed. The census was completed and the Confederated Bands were officially separated into three divisions:[7]

a. Those known as "Southern Utes," comprising the Capote, Muache and Weeminuche Bands, living in the southern part of the diminished 1868 Treaty reservation;

b. The "Uncompahgre Utes," composed of the Tabequache Band, residing in the central portion of the reservation; and

c. The "White River Utes," made up of the Yampa and Grand River Bands, from the northern section of the reservation.

After some difficulty, the Commission settled the Uncompahgre and White River Utes in Utah Territory. As to the Southern Utes, Manypenny recommended, after an inspection in the area, that the strip of land 100 miles long and 15 miles wide (Royce Area 617) be preserved for an indefinite period as an Indian reservation for the Southern Utes.[8] The Ute Commission report, as the Court of

[7] *Ute Indians* v. *United States*, 45 C.Cls. 440, 448; A. 24-25.

[8] That area was already recognized as the Southern Ute Reservation. CIA 1880, p. 17; CIA 1879, p. 16. In September, 1881, the

Claims noted, indicated that "both sides regarded the 1880 agreement as not in effect as to the Southern Utes, pending further measures." A. 76.

There was some uncertainty respecting the status of the lands ceded by the Act of 1880 following the removal of the White River and Uncompahgre Utes to Utah.[9] Apparently acting on advice from Attorney General Brewster to the effect that additional legislation was required to declare the portion of the Ute reservation "lately occupied by the Uncompahgre and White River Utes . . . to be public land of the United States, and subject to disposal" as such, Congress passed the Act of July 28, 1882, 22 Stat. 178.[10] It declared all of the land "lately occupied by the Uncompahgre and White River Utes" to be public land and subject to disposal in accordance with Section 3 of the Act of 1880; and in Section 2, provided that the Secretary of the Interior, at the earliest practicable day, ascertain and establish the line between the Southern Utes and the areas to the north. Instructions by the Secretary of the Interior for the survey provided that the survey was to commence at a point north of Royce Area 617. A. 77.

After the line was surveyed, the Southern Utes continued to live in the 15-mile strip recognized as their reservation.[11] This left the Southern Utes living between two white communities—one to the north in Colorado and one to the south in New Mexico. A. 79. The Secretary

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agent at the Southern Ute Agency reported the "Southern Ute Indians are located on *their old reservation* in Southwestern Colorado . . . 15 miles in width and 100 miles in length." CIA 1881, p. 23.

[9] *Confederated Bands of Ute Indians* v. *United States*, 100 C.Cls. 417.

[10] S.Doc. No. 108, 47th Cong., 1st Sess., pp. 1, 3-4. The Attorney General had advised the Secretary of the Interior on February 14, 1882, that additional legislation would be necessary to authorize dispositions under the public land laws. *Id.*, at 3-4.

[11] See, *e.g.*, CIA 1882, pp. 17-18; CIA 1891, p. 227.

of the Interior, on April 5, 1888, considering this problem, acknowledged the difficulty of protecting them from invasion by the whites, and recognized that "we are bound by solemn treaty stipulations . . . to prevent white people from entering upon or crossing said reservation." A. 79. This led to enactment of the Act of May 1, 1888, 25 Stat. 133. It provided for appointment of a Commission to negotiate with the Southern Utes for modification "of their treaty and other rights," possible "exchange of *their reservation*," and negotiation with other Indians if the Southern Ute Indians should determine "to remove from their present location."

An agreement was reached with the Southern Utes under which they would give up their reservation in Colorado and settle upon a reservation in southern Utah. This agreement was never ratified by Congress; in fact, it was "annulled" when Congress passed the Act of February 20, 1895, 28 Stat. 677.[12] That Act provided that the "treaty made with said Indians," ratified by the Act of 1880, "be carried out as *herein* provided, and as further provided by general law for settling Indians in severalty." It directed the Secretary of the Interior to provide for allotment in severalty "in their present reservation in Colorado" of such Southern Ute Indians as may elect and be considered by him to be qualified to take allotments.[13] It also provided that the western end of the 15-mile strip be reserved and set aside for those Southern Utes who did not elect or were not qualified for allotments. The lands *not allotted*[14] were to be subject to

[12] CIA 1890, p. XLIII; CIA 1891, p. 228; see S.Rept. 279, 53d Cong., 2d Sess., on S. 1532, a bill to ratify the 1888 Agreement.

[13] The allotments were to come from the lands "embraced in their present [Southern Ute] reservation in Colorado." (Sec. 2, 28 Stat. 677).

[14] Section 5 of the 1895 Act provided that the money realized from the sale of lands not allotted was to be held in the Treasury of the United States *in trust* for the Southern Ute Indians. 28 Stat. 678.

entry under public land laws at not less than $1.25 per acre. The 1895 Act also required that a majority of the male adult members of the Southern Ute Tribe living on the Southern Ute Reservation agree to its implementation (Sec. 6).

Most of the Capote and Muache Utes received allotments. A. 29. They continued to live in the eastern part of the reservation and became known and recognized as the Southern Ute Tribe.[15] Most of the Weeminuche Utes elected not to take allotments and continued to live in the area set aside as their reservation by Section 3 of the 1895 Act. This became known as the Ute Mountain Reservation and was administered by a separate agency, and the Weeminuche became known and recognized as the Ute Mountain Ute Tribe. The Ute Mountain lands are not involved in this case.[16]

Soon after the unallotted lands of the Southern Ute Reservation were opened to entry in 1889, Congress passed the Free Homestead Act of May 17, 1900, 31 Stat. 179. It provided that homesteaders fulfilling residence requirements on ceded Indian lands would be relieved of any "other or further charge of any kind whatsoever." 43 U.S.C. 179.[17] Over 35 years passed during which the Southern Ute lands remained available for free homesteads. It was not until 1938, after the Congressional

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[15] The Southern Ute Tribe is organized under the Indian Reorganization Act. 48 Stat. 984. A. 24.

[16] A. 29. The Ute Mountain Tribe is also organized under the Indian Reorganization Act.

[17] Because of some doubts as to whether that portion of the diminished 1868 Treaty reservation opened by the Acts of 1880 and 1882 was covered by the 1900 Free Homestead Act, Congress passed the Ute Free Homestead Act of June 13, 1902, 32 Stat. 384, 43 U.S.C. 203. The effect of the two Free Homestead Acts was the same, namely, no cash payment was required from the homesteader. See S.Rept. 1744, 57th Cong., 1st Sess.; and the debate in the House of Representatives, 35 Cong. Rec. 5493-5.

policy of giving away the Indians' unallotted lands had changed, that beneficial title to the undisposed of lands on the Southern Ute Reservation, relinquished under the 1895 Act, was restored to the Tribe, as provided by law. A. 29.[18]

Between the 1899 opening and the 1938 restoration, about 230,000 acres of land belonging to the Southern Ute Tribe were disposed of as free homesteads, for which "No payment has been made." A. 30-1. This is the land for which the Indian Claims Commission held the Southern Utes were entitled to just compensation and the court below affirmed except for the acreage which the court said was still open to proof. A. 97.

From July 26, 1899, to June 30, 1928, the government received $215,977.58 from the sale of some unidentified lands of the Southern Ute Tribe and this money was deposited in a Treasury account styled "Proceeds of Southern Ute Reservation," made up of "moneys available pursuant to the" 1895 Act. A. 31, 138.

In addition to the money received from the land sales, during the period May 13, 1892, to June 29, 1940, the government took in $19,124.22 and deposited it in a Treasury account entitled "Indian Moneys, Proceeds of Labor, Southern Ute Indians" (IMPL). A. 33-4. These proceeds represented in the main income from tribal trust lands, in the form of mineral royalties, timber sales, grazing and lease rentals, and damages for railroad rights-of-way. A. 33-4.

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[18] Order of Restoration, September 14, 1938, 5 Kappler 659; compare *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands*, 56 I.D. 330, 331 (1938). The first paragraph of the 1938 Restoration Order reads as follows:

> ". . . [P]ursuant to the provisions of the Act of February 20, 1895 . . . the Southern Ute Band of Indians in Colorado ceded to the United States a large area of *their reservation* in the State of Colorado *established expressly for their benefit* under the treaty of June 15, 1880 . . . ."

II. Prior Litigation by the Confederated Bands of Ute Indians Enforcing Rights Under the 1880 Act

Through the years, the Confederated Bands of Ute Indians have sued in the Court of Claims, and later the Indian Claims Commission, enforcing their rights under various treaties and agreements. Important to this case is the prior litigation surrounding the Act of 1880. For clarity, called for by the government's treatment in its brief, we review the main cases of the Confederated Bands which the government has contended, at one time or another, are *res judicata* to this sole claim of the Southern Ute Tribe.

1. *The 1910 accounting (No. 30360).* The Confederated Bands of Ute Indians sued under a 1909 jurisdictional act, 35 Stat. 788, for (a) an accounting of funds received by the United States from lands disposed of pursuant to the Act of 1880, and (b) payment for lands set aside as national forest reserves within the area ceded by the Act of 1880. *The Ute Indians* v. *United States*, 45 C.Cls. 440. In response to a call by the Court of Claims, the Secretary of the Interior reported on April 21, 1909, that between June 15, 1880, and June 30, 1908, the sum of $2,204,694.71 had been collected by the United States from disposals of lands "within the Ute Reservation"; but the Secretary's response did not distinguish between the kinds or locations of disposals and gave total quarterly receipts only.[19] However, in a response dated August 2, 1904, pursuant to an earlier call of the court in basically the same proceedings and made a part of the record, the Secretary supplied a statement up to June 30, 1903 "of the land sold by the United States under the acts of June 15, 1880, and February 25, 1895, lying within the Ute Indian Reservation in Colorado," but again without distinguishing between the amounts accruing un-

[19] Vol. 239, Printed Records, Court of Claims, December Term, 1909-1910, pp. 341-45.

der either Act.[20] The collections reported in the two secretarial responses are the same up to 1908. Thus, in an unidentified amount, the reported receipts between 1899 and June 30, 1908, included some proceeds of some lands disposed of under the Act of 1880, as well as the 1895 Act, and to the extent so included, those funds were in the gross $2,204,694.71 credited to the Confederated Bands. 45 C.Cls. 453, 461. The judgment was brought up to date, June 30, 1910. 46 C.Cls. 225.

As to the forest lands, the court found, based on the Secretary's response, that a total of 3,199,258 acres inside the diminished 1868 Treaty reservation (*supra*, pp. 2-3) had been set aside as national forest reserves. Of that amount, some 49,594 acres of the San Juan National Forest, set aside in 1907, 34 Stat. 3308, were within the Southern Ute Reservation; however, the proclamation did not show that any of the lands were within the reservation. Under the direction of the 1909 jurisdictional act, the court treated all forest reserves as if the land had been disposed of under the public land laws and fixed a value of $1.25 per acre, resulting in a total credit of $3,999,072.50 to the Confederated Bands. 45 C.Cls. 452-3. Thus, to the extent that the 49,594 acres were inside the Southern Ute Reservation, the sum of $61,993 ($1.25 per acre) out of the total credit of $3,999,072.50 was attributable to lands within the Southern Ute Reservation.

2. *The forest reserves claim (No. 47566).* In 1946, the Confederated Bands brought suit under the Ute Jurisdictional Act of June 28, 1938, 52 Stat. 1209, for just compensation for the taking by the United States of the same 3,199,258 acres of land set aside as national forest reserves and for which the Confederated Bands were credited with $3,999,072.50 in the 1910 accounting case. A stipulation for the entry of final judgment in the

[20] Vol. 217, Printed Records, Court of Claims, December Term, 1904-1905, pp. 70-74.

1946 case was approved and entered by the Court of Claims on July 13, 1950. *Confederated Bands of Ute Indians* v. *United States*, 117 C.Cls. 440. The settlement was based on a taking under the Fifth Amendment for which the United States was obligated to pay just compensation for the lands ceded by the Confederated Bands under the Act of 1880 and set apart by the United States for national forest purposes. The agreed value in No. 47566 for the 3,199,258 acres was $1.00 per acre, plus interest from the date of the Court of Claims judgment in 1910, less a deduction for the United States of $1.25 per acre ($3,999,072.50), as credited to the Confederated Bands in the 1910 judgment. 117 C.Cls. 440; see 120 ClCls. 641-2.[21]

3. *The undisposed of ceded lands claim (No. 45585).* A petition was filed November 22, 1941, by the Confederated Bands of Ute Indians pursuant to Section 6 of the 1938 jurisdictional act, 52 Stat. 1209, for the taking by the United States of the undisposed of land "north of and including township 35 north" ceded by the Act of 1880 (all outside the Southern Ute Reservation). In an opinion and interlocutory judgment dated October 4, 1943, the Court of Claims held that Section 6 constituted a taking of all the undisposed of lands "north of and including township 35 north," ceded in trust to the United States by the Confederated Bands in the Act of 1880. *Confederated Bands of Ute Indians* v. *United States*, 100 C.Cls. 413. The government's subsequent motion for instructions—in reality a new attack on the ground for liability in the 1943 decision—was denied on November 3, 1948. 112 C.Cls. 123, 137.

A stipulation for the entry of final judgment was approved and entered by the Court of Claims on July 13,

[21] Following the settlement in 1950 of this and other cases, the Court of Claims entered detailed findings on the bases for the settlements in connection with the award of attorneys fees. *Confederated Bands of Ute Indians* v. *United States*, 120 C.Cls. 609. Those findings are referred to here when they are explanatory.

1950, providing for payment of $24,296,127.24, plus 4% interest on $16,822,112.69 thereof, from July 10, 1950, to the date of payment of the $24,296,127.24. 117 C.Cls 434. The stipulation provided that the judgment so entered "shall be in full settlement and payment for the complete extinguishment" of the Confederated Bands' "right, title, interest, estate, claims, and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 . . . ."

As explained in the order for final judgment, the court's 1943 interlocutory judgment of liability (100 C. Cls. 413) was a "holding that plaintiffs were entitled to recover just compensation for all lands in Colorado north of and including township 35, north, held by the United States for disposal under Section 3 of the Act of June 15, 1880, at the time of approval of the Act of June 28, 1938," subject to the deduction of offsets. 117 C.Cls. 434.[22] None of that land was within the Southern Ute Reservation, as the government advises this Court. Br. 11.

4. *The free homestead lands claim (No. 46640).* This was the Confederated Bands' suit under the 1938 jurisdictional act, 52 Stat. 1209, for (a) an accounting for the proceeds received by the United States from all land sales between June 30, 1910, and June 28, 1938, of the lands ceded under the Act of 1880, and (b) the value of any such lands disposed of as free homesteads or taken by the United States for its own purposes.

A stipulation for the entry of final judgment was approved and entered by the Court of Claims in the amount

[22] Two schedules of land descriptions were annexed to the stipulation containing the individual tract descriptions of 4,403,935.87 acres of "surface and subsurface rights" and 787,056.86 acres of "subsurface rights only." Both schedules were prepared with such accuracy as "the parties with diligence have been able to determine." 117 C.Cls. 435.

of $6,037,567.72, plus 4% interest on $2,939,847.31 from July 10, 1950, to date of payment. *Confederated Bands of Ute Indians* v. *United States*, 117 C.Cls. 436. The stipulated judgment was in

> "full settlement and payment for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 (21 Stat. 199), which (a) the United States sold for cash between July 1, 1910, and June 28, 1938, (b) disposed of as free homesteads from December 19, 1885, to June 28, 1938, and (c) set aside for public purposes during the period from June 30, 1910, to June 27, 1938." 117 C.Cls. 436-437.

Annexed to and part of the stipulation and judgment was Schedule 1 containing the individual tract descriptions of 1,523,236.95 acres of land which the government had disposed of—1,361,993.22 acres as free homesteads and 161,243.73 acres set aside for public purposes.[23] These acreages are recited in the stipulation. The land descriptions in Schedule 1 represent "*all* the land so disposed of and set aside" so far as "the parties with *diligence*" could determine, but to assure that the settlement was complete, the following catch-all sentence was included in the stipulation (117 C.Cls. 437):

> ". . . However, the judgment to be entered in this case is *res judicata*, not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes."

[23] This document was also introduced in the present case as Southern Ute Exhibit 22. (Tr. 86, October 8, 1963).

Upon extensive examination, confirmed by the government's representatives,[24] it was agreed by the parties that 1,361,993.22 acres had been disposed of by the United States as free homesteads and an additional 161,243.73 acres were taken by the government for its own use, making a total of 1,523,236.95 acres, and Schedule 1 contains the tract-by-tract descriptions of those lands. 117 C.Cls. 437; 120 C.Cls. 638. The United States agreed with the Confederated Bands that $1.93 per acre was the "reasonable market value" of the lands. 120 C.Cls. 639.

Simple multiplication shows that $1.93 per acre for the total 1,523,236.95 acres results in the principal amount of $2,939,847.31 as set out specifically in the final judgment, and that the remainder of the total judgment of $6,037,567.72, or $3,097,720.41, represents interest, as the increment of just compensation. 117 C.Cls. 436-7; 120 C.Cls. 639. It is a mathematical certainty that no Southern Ute Reservation land here claimed was paid for in No. 46640. There was *not one single acre* of the approximately 230,000 acres claimed in this suit identified or paid for in No. 46640.[25]

As filed, No. 46640 also included an accounting claim to cover the period from June 30, 1910 (final judgment date in No. 30360, 46 C.Cls. 225; 45 C.Cls. 440), to June 28, 1938. Upon exhaustive examination, the Confederated Bands became satisfied that the $1,143,723.89 collected from the disposal of about 605,190.54 acres had been paid over to the Confederated Bands and no fur-

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[24] These acreages were "accepted by counsel for both sides as the basis for the stipulated judgment" in the case. 120 C.Cls. 638. The diligence with which the descriptions were prepared is related in 120 C.Cls. 637-8 and in the supplemental findings of the Indian Claims Commission. A. 62-5.

[25] The government has agreed on more than one occasion that none of the approximately 230,000 acres here claimed is identified in Schedule 1. See, *e.g.*, Tr. 11, April 17, 1968, Indian Claims Commission.

ther relief as to that matter was sought. 120 C.Cls. 637-9. Additionally, the Confederated Bands had pending a general accounting claim in which the disposition and other transactions, other than collection of proceeds, were covered. No. 47567, *infra*, this page.

5. *The Executive Order lands claim (No. 45783).* By an Executive Order dated November 22, 1875, the President withdrew and set apart for the Ute Indians about 625,000 acres of land as an addition to "their present reservation" along the north boundary of the diminished 1868 Treaty reservation. About seven years later, in an Executive Order dated August 4, 1882, the lands covered by the 1875 withdrawal were restored to the public domain. The Confederated Bands of Ute Indians brought suit under the 1938 jurisdictional act for the loss of the 625,000 acres of Executive Order land. The case was dismissed by the Court of Claims and this Court affirmed that judgment on the ground that the Confederated Bands had no compensable ownership interest in the 1875 Executive Order lands. *Confederated Bands of Ute Indians* v. *United States*, 106 C.Cls. 33, 51, 64 F.Supp. 569; affirmed, 330 U.S. 169 (three Justices dissenting).

The government tells the Court that counsel, in their briefing in 1947, told this Court that the Ute Indians ceded *all* Colorado lands in 1880. Br. 11. We will have more to say about this a little later, but suffice it to say for now that the government exaggerates (see discussion, *infra*, pp. 43-6). This Court's opinion on the Executive Order lands claim and counsel's statements fall far short of the government's interpretation of the holding (Br. 12), let alone what counsel briefed (*infra*, p. 44).

6. *The general accounting claim (No. 47567).* On December 30, 1946, a general accounting claim was filed by the Confederated Bands of Ute Indians for all jointly shared funds from March 2, 1868, the ratification date of the treaty which recognized their reservation in western Colorado (15 Stat. 619), to December 31, 1946, the

cutoff date under the 1938 jurisdictional Act (52 Stat. 1209). *Confederated Bands of Ute Indians* v. *United States*, 174 C.Cls. 1279. By stipulation, entered as part of the judgment on February 8, 1966, by the Court of Claims, "all rights, claims, and demands" which the Confederated Bands have or could have had were concluded as of December 30, 1946, with offsets down to June 30, 1964. 174 C.Cls. 1279. The settlement was subject to the following exclusions, *Id.*, at 1281:

> "4. This settlement does not involve the four funds: (1) Proceeds of Southern Ute Reservation; (2) Interest in Proceeds of Southern Ute Reservation; (3) Indian Moneys, Proceeds of Labor, Southern Ute Indians; and (4) Interest on Proceeds of Labor, Southern Ute Indians.
>
> "5. Neither the claims nor defenses asserted in Indian Claims Commission Docket No. 328 are affected by the disposition of this case. Counsel for plaintiffs in No. 47567, who are also counsel for petitioner in No. 328, will make no claim in No. 328 for funds involved in No. 47567."

SUMMARY OF ARGUMENT

I

The claims in suit are not barred by res judicata

The Confederated Bands of Ute Indians ceded to the United States through the Act of 1880 all of their diminished 1868 Treaty reservation, excepting and reserving to the Southern Utes such lands in the vicinity of the La Plata River in southern Colorado as were necessary for their occupancy pursuant to that Act. As to the lands actually ceded in trust by the Act of 1880, in which the Confederated Bands shared jointly, the United States opened them to entry under the public land laws by a supplementary 1882 Act, which also required the survey of a line dividing the lands reserved to the Southern Utes from those ceded and opened.

These actions in 1880 and 1882 confirmed the ownership of the Southern Ute lands in southern Colorado. A few years later, pursuant to Congressional authorization, Commissioners for the United States entered into an agreement with the Southern Utes alone for an absolute cession of the area reserved for them under the Act of 1880. This action in 1888 again confirmed the complete ownership of the Southern Utes of their reserve as opposed to the lands ceded and opened by the Acts of 1880 and 1882.

Congress failed to ratify the Agreement of 1888 with the Southern Utes and, in fact, specifically "annulled" it and substituted the Act of February 20, 1895, 28 Stat. 677, under which the Act of 1880 was to be carried out as "provided" in the 1895 Act. The 1895 Act provisions were substantially different from those of the Act of 1880; some Southern Utes were to be allotted and some were not. For those not allotted, a separately described reservation from within their reserved lands was delineated for their sole and absolute ownership. Those Southern Utes to be allotted were to receive their individual allotments and the proceeds from the disposal of the lands surplus to allotment within the area reserved for them and separated from the lands opened by the Act of 1882.

The Southern Utes were recognized as a separate landowning entity distinct from the Confederated Bands of Ute Indians with whom they shared jointly and ceded the diminished 1868 Treaty reservation by the Act of 1880, except for the Southern Ute lands. The entire history of legislative and administrative events from a time before the Act of 1880 until after the 1895 Act points to the inescapable conclusion that there was both Congressional and administrative recognition of complete ownership by the Southern Utes of the lands reserved for them under the Act of 1880.

The Southern Ute Tribe sued under Section 2 of the Indian Claims Commission Act for just compensation for about 230,000 acres of land disposed of by the United States in violation of the 1895 Act and also for an accounting for the proceeds received by the United States from other lands (about 82,000 acres) disposed of in accordance with the 1895 Act. The government defended on the ground that the claims were *res judicata* because of a prior judgment pursuant to a settlement stipulation in 1950 in a case in the Court of Claims brought by the Confederated Bands of Ute Indians for their joint losses under the Act of 1880. The Indian Claims Commission held that the Southern Utes were entitled to just compensation for the taking of the 230,000 acres, that the claims were not *res judicata* because the parties and issues were different, and that the lands in this suit were not ceded by the Act of 1880, but by the 1895 Act. The Court of Claims, on appeal by the government, affirmed except for the acreage taken.

II

The respondent is entitled to a true and proper accounting

The government apparently admits that the Southern Ute Tribe has not had an accounting of the proceeds from the 82,000 acres but asserts that, if not *res judicata*, on the same basis as the claim for just compensation, the accounting pleaded is being turned into a general accounting and the statutory time bar in the Indian Claims Commission Act prohibits such a general accounting. Additionally, the government objects to the order of the Indian Claims Commission, affirmed by the court below, that the government furnish the accounting down to the date of judgment.

The government's attack is on the jurisdiction of the Indian Claims Commission, affirmed by the court below, conduct after August 13, 1946, and it goes so far as to suggest that prior adjudications of the Indian Claims

Commission in which it was a party are without force. The details of the accounting in this case clearly show that there is nothing general and that each item is directly related to the specific accounting claim pleaded. As for the up-to-date accounting, the Indian Claims Commission and the Court of Claims relied on the elementary principle that once jurisdiction attaches the tribunal is entitled to determine all matters related thereto down to the date of judgment. Both the Commission and the Court of Claims have held this position in reliance on their established precedents since at least 1956, without deviation (and without appeal to this Court by the government).

ARGUMENT

I. These Claims are Not Precluded by the Defense of Res Judicata

This is a case where the United States, as trustee and guardian of the Southern Ute Tribe of Indians, has taken tribal land by giving it away and has failed to account to the Tribe for the proceeds from other lands. It seeks to escape liability to pay for the lands and to render a proper and complete accounting by erroneous interpretations of the Act of 1880 and a stipulation of settlement in prior litigation involving another entity and different property.[26] If upheld, the United States would be allowed to avoid any payment whatsoever for over 230,000 acres of Southern Ute lands taken in violation of the Act of February 20, 1895, 28 Stat. 677, and an accounting for proceeds received by the United States under that Act.

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[26] *Confederated Bands of Ute Indians* v. *United States*, 117 C. Cls. 433.

A. *The Southern Utes Reserved Their Lands Under the Act of 1880, which Ceded the Lands of the Confederated Bands of Ute Indians*

The Confederated Bands of Ute Indians, of which the Southern Utes were a constituent part, owned and occupied all of their diminished 1868 Treaty reservation, when in 1879, following the so-called "Meeker massacre," the United States decided on its own that the Utes must be removed from the scene of that tragedy, and possibly from Colorado entirely.[27] To accomplish this purpose, a delegation of the Confederated Bands was brought to Washington and was induced to propose a cession of their diminished 1868 Treaty reservation.[28] The "agreement" was not signed by any government officer, but was ratified by Congress as amended by the Act of June 15, 1880, 21 Stat. 199.

The Act of 1880 provided for ratification by three-fourths of the adult male members of the Confederated Bands,[29] none of whom other than the nine negotiators had seen the cession documents up to that point. The Act provided for a cession of the diminished 1868 Treaty reservation "*except*" that the Uncompahgre Utes were to be allowed to settle upon agricultural lands on the Grand River near the mouth of the Gunnison River, in Colorado, if sufficient land could be found there, otherwise, in the Territory of Utah;[30] the White River Utes were to remove to and settle upon agricultural lands on the

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[27] S.Rept. 279, 53d Cong., 2d Sess., pp. 1-2, to accompany S.1582.

[28] A delegation of Utes was brought to Washington in the winter of 1880 and remained during negotiations which spanned a period of eight weeks for this purpose. CIA 1880, pp. XXIV, 18.

[29] This was required by Article XVI of the 1868 Treaty. 15 Stat. 622.

[30] Br. 45. Sufficient land was not found in that vicinity; the Uncompahgre Utes were thereafter settled in Utah. A claim based on the failure of the government to locate sufficient land in Colorado for the Uncompahgre Band as provided in the Act of 1880 was settled. 14 Ind.Cl.Com. 707.

Uintah Indian Reservation in Utah; and the Southern Utes were [31]

> "... to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico."

The ratification agreement was signed by the Southern Utes in August and September of 1880. It was the only document ever signed by the Indians to ratify the cession under the Act of 1880. The ratification document provided that the Southern Utes did "cede, sell and convey" to the United States the diminished 1868 Treaty reservation "excepting and reserving such lands on the La Plata River and in its vicinity . . . selected and set apart for the whole or a part of the Southern" Utes in pursuance of the Act of 1880.[32]

The government argues that the United States proposed "an agreement to eliminate, completely, the existing reservation," and that it was "central to the new scheme," *i.e.*, the Congressional plan, that none of the land reserved by the Southern Utes was to be held tribally. Br. 6. The clairvoyance of the government in 1971 seems particularly questionable in view of the fact that Congress, which ratified the Agreement of 1880, never was so certain about what it had effected by the

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[31] Br. 44. The La Plata River runs southwestward through about the middle of Royce Area 617.

[32] CIA 1881, p. 208, Ratification of Agreement with Utes. As to the mechanics of the Agreement and Act of 1880, Assistant Attorney General Willis Van Devanter stated: "This agreement was originally submitted at Washington by 'certain of the chiefs and headmen' of the Indians and had not been acted upon by the Indians themselves in council or otherwise." *Opinion*, 25 L.D. 97, 99, approved August 5, 1897, by the Acting Secretary of the Interior.

Act of 1880. And the administrator of the matter, the Secretary of the Interior, the cabinet officer responsible for supervision of the affairs of the Indians at the time, reached the entirely opposite conclusion as to the Act of 1880.

That the government's present interpretation is not supportable is demonstrated by a review of the legislative and administrative events which followed ratification of the Act of 1880. The parties to that Act intended, as is clear from the agreement, that *some* of the Utes would always remain on the diminished 1868 Treaty reservation. The Uncompahgres were to be settled on agricultural lands at the mouth of the Gunnison River and the Southern Utes upon agricultural lands in the area of the La Plata River in southern Colorado. Br. 44-5. Congress fully realized a clear identification of the Confederated Bands was necessary when it provided for a commission to take a careful census and identify the members of the separate bands comprising the Confederated Bands. 21 Stat. 202.

After its appointment, the Ute Commission completed the census and separated the Confederated Bands. It recommended that the United States modify the Act of 1880 as to the Southern Utes and "preserve" the 15-mile strip along the southern Colorado border "for an indefinite period *as an Indian reservation, and let the United States laws in relation to Indian reservations have full force therein.*" [23] This was the administrative conclusion

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[23] Quoted at length by the court below. A. 75-6. Following selection of lands for allotment, and upon investigation of the Southern Utes, Commissioner Manypenny recommended as follows (A. 76):

"I can see no other way than to so modify the [1880] agreement, so far as these [Southern Ute] Indians are concerned, as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and *preserve all the land within these lines for an indefinite period as an Indian reser-*

reached immediately following the Act of 1880. The Secretary of the Interior then advised Congress late in 1881 that the Southern Utes "still occupy their old reservation" and that there was insufficient agricultural land for their allotment in the vicinity of the La Plata River.[34]

B. *The 1882 Act Was Necessary to Authorize Disposition of the Ceded Lands*

As noted by the Court of Claims, the November 21, 1881 report of the Ute Commission demonstrated "that both sides regarded the 1880 agreement as not in effect as to the Southern Utes, pending further measures." A. 76. They were living on their 15-mile strip, but the other bands of Confederated Utes had been moved to Utah.[35] Since the Act of 1880 did not actually allow settlement by non-Indians on any of the ceded lands, Congress passed the Act of July 28, 1882, 22 Stat. 178, which declared all of the area theretofore occupied by the Uncompahgre and White River Utes to be public land and subject to disposal in accordance with the Act of 1880. At the same time, the Act of 1882 segregated the Southern Ute 15-mile strip from the opened area.[36] The 1882 Act required that the Secretary of the Interior "ascertain and establish the line" between the Uncompahgre and White River areas on the north and the Southern Ute area on the south, *i.e.*, Royce Areas 616

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vation, and let the United States laws in relation to Indian reservations have full force therein."

The Ute Commission adopted this recommendation and so reported to the Secretary of the Interior. CIA 1881, p. 325.

[34] CIA 1881, pp. XLVI, 333. Appropriate measures were also taken by the Ute Commission for the settlement of the other bands of Confederated Utes. CIA 1881, pp. 326-332; see *Uintah and White River Bands of Ute Indians* v. *United States*, 139 C. Cls. 1, 5-6.

[35] See documents cited in fn. 34, *supra*.

[36] See fn. 10, *supra*.

and 617, respectively. As indicated by the Court of Claims, A. 77-78, the instructions of the Secretary of the Interior to the district land offices to implement the Act of 1882 indicated a clear understanding that Royce Area 617 was to be continued as a reservation for the Southern Utes, with the land held in tribal ownership.

The events surrounding the 1880 and 1882 Acts establish that the United States formally separated the Confederated Bands of Utes, recognized the Southern Utes as a separate entity and identified and acknowledged their ownership of the area reserved for them by the Act of 1880. When the United States ordered and took the census to identify and separate the Southern Utes, consisting of the Capote, Muache and Weeminuche Bands, all in accordance with the 1880 Act, it recognized a new land-owning entity different from the Confederated Bands of Utes.[37] The Ute Commission, when it recommended continuation of the 15-mile strip as an Indian reservation, identified and recognized the Southern Utes as the sole owners. Even if this was regarded as less than recognized title at that time, the events most certainly constitute Congressional knowledge of the *de facto* situation of administrative recognition of the tribal rights of the Southern Utes in the 15-mile strip.

This action by the United States and its administrators shows conclusively that the rights of the Confederated Bands as an entity in the 15-mile strip were terminated upon establishment of the lands as a reservation for the Southern Utes. No complete interest of the United States had ever attached itself to the Southern Ute Reservation since it had been reserved to the Southern Utes by the 1880 Act. The 15-mile strip had been administered separately from the ceded Confederated Ute lands opened by the Acts of 1880 and 1882.

The Act of 1880 was not self-executing as it related to the immediate cession to the United States by the Con-

[37] See *Ute Indians* v. *United States*, 45 C.Cls. 440, 448-449.

federated Bands of any of the lands of the diminished 1868 Treaty reservation. In pertinent part, it might be said, the provisions of the Act of 1880 provided that a sufficient quantity of land be surveyed to allow allotment of the Indians; that each member of each band of the Confederated Utes be allotted; that after allotments all surplus lands would become public lands of the United States and subject to disposal; that the proceeds of such dispositions would be used first to reimburse the United States for its expenses incurred in carrying out the provisions of the Act and to pay the United States for any lands used for allotments and located outside the boundaries of the Ute Reservation at $1.25 per acre. The remaining proceeds, if any, would be held for the benefit of the Confederated Bands in the following proportions: One-third to the Southern Utes, one-half to the Uncompahgre Utes, and one-sixth to the White River Utes.

The Southern Utes were already living within the La Plata River area from which they were to receive their allotments. No action was taken toward allotting them because the Ute Commission recognized that the Southern Utes were not ready for allotments and their lands were not adequate for that purpose. After the Uncompahgre and White River Utes had been removed from Colorado in 1881, the settlers entered without legal authority the lands in Royce Area 616 formerly occupied by those two bands. As the lands in Royce Area 616 were to be available to public entry only *after* allotments to the Indians, additional action by Congress was necessary. This action was taken by Congress by the Act of July 28, 1882, 22 Stat. 178, which provided:

> "That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limita-

tions of section three of the act of Congress approved June fifteenth, eighteen hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act."

It is essential to note that under the 1882 Act, the proceeds to be derived from the sale of Royce Area 616 lands were to be divided pursuant to the agreement ratified in the Act of 1880. This reconfirms the joint Confederated Bands ownership of that land.

The 1882 Act did not modify the Act of 1880 as to the Southern Utes; it merely executed its provisions as to the lands vacated by the Uncompahgre and White River Utes, *i.e.*, Royce Area 616. The 1882 Act recognized that the Act of 1880 was executory as to the lands then occupied by the Southern Utes, for by Section 2, it provided (22 Stat. 178):

> "That the Secretary of the Interior shall, at the earliest practicable day, ascertain and establish the line between the land mentioned in section one of this act and that now or lately occupied by the Southern Utes in said State; and for that purpose there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of five hundred dollars."

C. *The 1888 and 1895 Acts Demonstrate That the Southern Ute Lands Were Not Ceded by the Act of 1880*

Congress allowed things to remain this way until 1888. The Commissioner of Indian Affairs was concerned with the problem of protecting the Southern Utes, *i.e.*, preventing non-Indians from entering upon or crossing the Southern Ute Reservation. Although legislation to allow non-Indian settlement of the Southern Ute Reservation was considered during each session of Congress, but one, after

1880, it was not until 1888 that Congress took some positive steps to deal with the Southern Utes.

Section 4 of the Act of 1888, 25 Stat. 113, authorized the Secretary of the Interior to appoint a commission with authority to

> ". . . [N]egotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of *their reservation*, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of Ute Indians of southern Colorado if said Indians shall determine to remove from their present location; the report of said commission to be made to and subject to ratification by Congress before taking effect; . . ." (25 Stat. 113, 133).

The Commission thereafter negotiated an agreement with the Southern Ute Indians. It provided for a cession by the Southern Ute Indians of all their right, title and interest in the Southern Ute Reservation in return for a new reservation in the Territory of Utah. Even if we ignore what went on before, the 1888 Act was passed with Congressional knowledge of the separation of the Southern Utes as an entity from the Confederated Bands of Ute Indians by the Act of 1880 and recognized that they were in full possession and ownership of the Southern Ute Reservation pursuant to that Act. This constituted further Congressional recognition that Royce Area 617 remained the sole property of the Southern Utes. The Court of Claims noted, correctly, that "The agreement which emerged pursuant to this [1888] act substantiates this view." A. 80.

The government omitted discussion of the 1888 Act and the agreement negotiated thereunder in its presentation

to the Court of Claims and plays it down here by merely mentioning that "The Tribe agreed to give up its rights in its former reservation to remove and settle upon a reservation in Utah." Br. 8. But this vital link in the history of the Southern Ute Reservation and its implications cannot be glossed so easily. The Court of Claims had this explanation: [36]

> "A reasonable explanation for the act's exclusive terms is that the Southern Utes were the only band of the confederation as to whom the 1880 agreement was still executory."

Although negotiated by special direction of Congress, the 1888 Agreement failed of ratification by Congress and was, in fact, "annulled" by the Act of February 20, 1895, 28 Stat. 677, which was passed in lieu thereof. The 1895 Act, in section 1, provided that the "treaty" of 1880 "be carried out as herein provided, and as further provided by general law for settling Indians in severalty." A. 133.

If, as the United States claims, all of the Southern Ute 15-mile strip was ceded by the Act of 1880, it must rely on an interpretation that the 1895 Act executed the Act of 1880, just as the 1882 Act executed the 1880 Act as to the Uncompahgre and White River area to the north. But the 1895 Act, despite the pronouncement in the preamble, did not do that. The 1880 Act related to lands held by the Confederated Bands of Utes; the 1895 Act dealt only with lands owned by the Southern Utes.

First, the 1895 Act provided for a division of the Southern Ute Reservation between allotted and unallotted members. Section 3 states, A. 134:

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[36] A. 80. As to the former White River and Uncompahgre areas, the 1882 Act had operated to place the lands therein within the public domain, make them subject to entry under the public land laws, and thus implement or "execute" the Act of 1880 as to those lands. 22 Stat. 178.

> "That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the preceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of [a described boundary] . . . ."

Language such as this, whether in a treaty or act of Congress, has long been held to recognize the complete and absolute ownership of the land to the exclusion of all others, and where other Indians are put on such lands, the United States has taken an interest in the lands. *Shoshone Tribe* v. *United States*, 299 U.S. 476. Thus, as to the unallotted Southern Utes, a separate and solely-owned, defined reservation was set aside for them. No other Indians could have had an interest in that land under the language of Section 3 of the 1895 Act. Since the unallotted Southern Utes were to hold their sole reservation, then surely the allotted Southern Utes were to have "their interest in all tribal property" outside that reservation. This was the *quid pro quo*, and the basis of the fair dealings in the 1895 Act providing for the two groups of Southern Utes.

Section 5 provided for payment by the United States to the "said Indians" out of the moneys first realized from the sale of the "opened" lands as follows: $5,000 annually for ten years per capita to "all of said Indians"; $20,000 to the Secretary of the Interior for investment in sheep to be divided among "said Indians per capita"; and $500 to the principal chiefs, including the chief of the Weeminuche. The balance, after deducting the expenses of sale and survey, was to be held in the Treasury "in trust for the sole use and benefit of said Southern Ute Indians." A. 135-6.

Finally, Congress provided that the Act of 1895 must be ratified by a majority of the adult males of the Southern Ute Tribe. This was further Congressional recogni-

tion that the 15-mile strip was solely Southern Ute land, for it did not follow the requirement of the 1868 Treaty or the Act of 1880 that disposition of Confederated Ute lands be approved by a three-quarters vote of all male adults of the White River, Uncompahgre and Southern Ute Bands.

This interpretation of the 1895 Act precludes the government's assertion that the lands involved were ceded by the Act of 1880, for they were disposed of specifically pursuant to the terms of the 1895 Act.

Thus it is clear that the 1895 Act, so far as the 15-mile strip is concerned, universally acknowledged and referred to prior to 1895 as the Southern Ute Reservation, completely recognized the Southern Ute ownership in the lands opened to public entry under its provisions, as contrasted to the jointly owned lands ceded by the Act of 1880. No other construction can be made of the 1895 Act. Whatever the import of the 1895 Act, *viz-a-viz*, the Confederated Bands as a whole and the Southern Utes (Capote, Muache and Weeminuche Bands) or the obligations and liabilities of the latter three bands each to the other,[29] it is inescapably clear that so far as the lands and proceeds from lands opened under the 1895 Act are concerned, the Southern Utes alone owned the right to the property.

D. *The Legislative History Does Not Support the Government's Contention that the Southern Ute Reservation Was Ceded by the Act of 1880*

The government contends that it was the intent of Congress by the Act of 1880 to eliminate all Indian reserva-

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[29] We also asserted in the court below that the 1895 Act worked a cross-relinquishment of interests between the allotted Southern Utes, who are now organized as the Southern Ute Tribe, respondent here; and the unallotted group now organized as the Ute Mountain Ute Tribe, which was the sole beneficiary of the lands set aside under Section 3 of the 1895 Act. See *supra*, pp. 8-9, 20-1.

tion lands from the State of Colorado. It cites the debates in Congress preceding the Act to support its contention that the Act of 1880 did not reserve a reservation for the Southern Utes or "recognize that they continued to possess one." [40] Reference to the debates, however, shows that while the members of Congress were in reasonable agreement that they were referring to one total area comprising more than 15,000,000 acres, they were not at all unanimous or certain that the bill under debate was intended to or could accomplish removal of the Southern Utes. Possibly, some confusion was traceable to the attitude of Senator Teller of Colorado, who was insistent that the Confederated Bands, including the Southern Utes, not be permitted to remain in Colorado and complained that the basic scheme of the Act of 1880 would result in preservation of Indian reservation life in Colorado.[41]

Congress next took action, following the Act of 1880, with regard to the Ute Reservation in Colorado in 1882. On January 9, 1882, it adopted Senate Resolution 21, which directed the Secretary of the Interior to inform the Senate: [42]

> ". . . [W]hether further legislation is necessary to open for settlement under the preemption laws of the United States that part of the Ute reservation in the State of Colorado *not assigned to the Southern Ute Indians* by the provisions of the act of June 15, 1880; also whether the land on which said Southern Ute Indians are by the provisions of said act to be placed

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[40] Br. 6-8. The basis of the government's argument that the claim in suit is barred by *res judicata* seems sound only if the lands involved were ceded unconditionally by the Act of 1880. In arguing that this was achieved, the government claims support from the legislative history of the 1880 Act and other Acts. Br. 21-22.

[41] H. Rept. 1401, 46th Cong., 2d Sess., to accompany S. 1509, pp. 4-7. Secretary of the Interior Schurz disagreed with Senator Teller. *Id.*, at 7.

[42] 13 Cong. Rec. 266.

is suitable as a permanent home for the said Indians."

The Secretary of the Interior responded to Resolution 21 in a report to the Senate Committee dated February 14, 1882. The response is contained in Senate Ex. Doc. No. 108, 47th Cong., 1st Sess. The Secretary summarized an opinion of the Attorney General dealing with the inquiry of Senate Resolution 21 in these words:

> "It will be seen by his letter . . . that in his opinion this cannot be done under existing law; hence, if it be done at all, additional legislation is necessary." *Id.*, at 1.

Explaining that the Uncompahgre and White River Utes had been moved to Utah, and that there was some dissatisfaction and restlessness on their part, the Secretary of Interior advised the Senate that he felt

> ". . . constrained . . . to say in this condition of affairs I seriously doubt the propriety of opening the lands in question at the present time. To take this action before the Indians shall have received all that they are to receive as a consideration for the surrender of their former homes, may tend to increase still further their present discontent, and may be used by mischievous men to that end." *Id.*, at 2.

Turning to the problem of the Southern Utes, the Secretary said:

> ". . . it appears, from the report of Hon. George W. Manypenny, the Ute Commissioner, who, during the last year's [1881] operations, had special charge of the operations of the commission touching the Southern Utes, that there is not sufficient land of the character required to carry out the stipulation with these Indians in the region of country now occupied by them; . . .
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> * * * *
>
> "It is not at all unlikely that negotiations will have to be entered into with the Southern Utes for

> their removal from Colorado, and legislation is understood to be now pending before Congress looking at such end. This would then be an additional reason for withholding any legislation looking toward the opening up of their lands until such steps as Congress may see fit to take in relation to the final settlement of the Southern Utes is fully determined and completed." *Id.*, at 2.

In the opinion furnished the Secretary, the Attorney General said the lands of the Ute Indian Reservation in Colorado could not be opened for settlement under the Act of 1880 until allotments in severalty had been made to the Indians as provided by that Act, because until the lands were allotted, it could not be precisely known what lands would be subject to entry. Therefore, the lands could not be held and deemed to be public lands subject to disposal under appropriate law until allotments had been selected for the Indians and the report of the Ute Commission approved by the President. He concluded, as indicated above, that additional legislation would be necessary to open the White River and Uncompahgre areas of the Reservation to immediate settlement and disposal. *Id.*, at 4.

The Secretary also attached to his letter a letter from the Commissioner of Indian Affairs, dated January 27, 1882, and written in reply to questions generated by Resolution 21. The Commissioner recommended that "lands for the permanent settlement of the Southern Utes be given them elsewhere than as provided in the said [1880] agreement." *Id.*, at 6.

The bill which became the Act of July 28, 1882, 22 Stat. 178, was S. 698. The Senate Report on that bill, No. 186, 47th Cong., 1st Sess., followed in time Executive Document No. 108. *Supra.* The report explained that the White River and Uncompahgre Utes had been removed to Utah Territory during 1881 and then made this statement:

"It is clear that by the terms of this [1880] act, the lands formerly occupied by the Uncompahgre and White River Utes cannot be held to be public lands, subject to disposal, without further legislation, until the lands of the new reservation shall have been surveyed, and the allotments to the Indians shall have been made and patents issued, etc. As some of these Indians are opposed to accepting their lands in severalty, it may be several years before the work of making the allotments will be completed. Under the most favorable conditions, it probably cannot be done in less than two years." *Id.*, at 2.

The report pointed out that non-Indians had poured into Colorado since the Uncompahgres and White Rivers had moved to Utah, that it was only fair to the settlers that the Colorado areas be thrown open to settlement, and the Commissioner of the General Land Office reported that he knew of no objection to opening such land if the Indian rights to allotment within the limits of the reservation formerly occupied by the Uncompahgre and White River Utes had been satisfied by action of the Secretary of the Interior.[43]

The problem of the Southern Utes remained with Congress thereafter and each session of Congress saw many bills introduced relating to Indian lands in Colorado.[44]

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[43] S.Rept. No. 186, 47th Cong., 1st Sess., p. 2. There was no mention of the Southern Ute Reservation. The discussion and reports involving the 1882 Act and its legislative history are consistent in showing: (1) Congress in 1882 considered that the 1880 Act was executory in nature; (2) subsequent legislation was needed to complete execution of the 1880 Agreement and open the 1868 Reservation to public settlement; and (3) a reserved area for the Southern Utes was created by the 1880 Act and it remained a Southern Ute Reservation until legislative action (opening lands to disposal in 1895) and administrative action (allotting after 1895) had been achieved.

[44] The one exception was the Second Session of the 47th Congress, in which no bill was introduced.

In 1886, S. 1916 was introduced by Senator Bowen of Colorado.[45] The Senate Report (No. 836, 49th Cong., 1st Sess., April 30, 1886, to accompany S. 1916) contains revealing background information. It includes the testimony of Southern Ute chiefs that they owned their reservation by statute, that they wanted to move because of white encroachments, and they believed legislation to be necessary because their reservation was held under recognized title (by treaty or statute). The second section of S. Rept. No. 836 contains this quotation from a letter of April 5, 1886, from the Commissioner of Indian Affairs to the Secretary of the Interior:

> "Accordingly, I have the honor to state that it is the declared wish of the Southern Ute Indians to remove from their present reservation; but it appears they do not desire to become consolidated with or settle amongst either of the other Ute [Uncompahgre or White River] tribes. They are very much dissatisfied with their present reservation and the first proposition looking toward their removal came from the Indians themselves. This dissatisfaction is due in large measure to the disadvantages arising from the unfortunate position and configuration of their reservation, which is 110 miles in length by only 15 miles in width. . . ." *Id.*, at 3.

During the first session of the 50th Congress (1887) additional bills to remove the Southern Utes from Colorado were introduced. S. 104 (19 Cong. Rec. 21) and H.R. 1265 (19 Cong. Rec. 208) were two. The House Report on H.R. 1265 (H. Rept. 861, 50th Cong., 1st Sess.) contained a favorable recommendation from the Commissioner of Indian Affairs and the Secretary of the Interior. They reported that the three principal chiefs of the Southern Utes had come to Washington during the first session of the 49th Congress (1886), by direction of the Commissioner of Indian Affairs, and testified before

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[45] 17 Cong. Rec. 2521.

the Senate and House Committees on Indian Affairs that they wished to be removed from their present reservation in southwestern Colorado to a new reservation in the Territory of Utah. The Committee Report pointed out the territorial inadequacy of the Southern Ute Reservation, intermingling of sheep and horses belonging to the whites and the Indians, and concluded that "the peculiar shape and location of the Indians' reservation and the settling up of the country around it, produces continual trouble." H.Rept. 861, p. 10. While the House Committee favored enactment of H.R. 1265, it did so only if three-fourths of the Southern Ute males consented to removal and if the legislation provided the "proceeds arising from the sale of all the lands in their present reservation" were to be set aside in a trust fund for the benefit of the Southern Ute Indians. (H. Rept. 861, p. 9).

Another and definite recognition of the existence of the Southern Ute Reservation is found in action of the Senate. On March 31, 1888, it passed a bill granting a right-of-way to the Durango, Cortez & Utah Railroad Company through the Southern Ute Reservation.[46] Section 3 of the bill provided:

> "That it shall be the duty of the Secretary of the Interior to fix the amount of *compensation to be paid the Indians* for such right-of-way . . . ."

Another section provided:

> "That the President of the United States shall require that the *consent of the Indians* to said right-of-way shall be obtained by said railroad company, in such manner as he may prescribe, before any right under this Act shall accrue to said company."[47]

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[46] 19 Cong. Rec. 2546.

[47] *Ibid.* No such requirements would be imposed on land, as the government suggests, set aside merely for the purpose of providing allotments in severalty to individual Indians.

The Commission appointed pursuant to the Act of May 1, 1888, 25 Stat. 133, negotiated an agreement with the Southern Utes for modification of their "treaty or other rights," and made its report, supported by a journal of its proceedings, to the Secretary of the Interior on January 2, 1889. The report included a draft of proposed legislation, which was forwarded to Congress and purportedly followed the agreement negotiated with the Southern Utes, providing that the Southern Ute Indians would "cede, grant, convey and relinquish all right, title, interest, claim, privilege or immunity in and to the Southern Ute Reservation." [48]

A bill (S. 3894) to ratify the 1888 Agreement was introduced in Congress on February 1, 1889, 20 Cong. Rec. 1391, was reported back with amendments, 20 Cong. Rec. 1600, debated, amended and passed the Senate. 20 Cong. Rec. 2284, 2285-2287. No action was taken in the House.

Similar bills were introduced in the next Congress (1890-1). Starting in 1892, there was a discernible shift in Congressional attitude towards the 1888 Agreement, when Senator Wolcott of Colorado introduced a resolution on March 28, 1892, requesting that the President "refrain from allotting in severalty the lands of the present reservation for the Southern Ute Indians." (23 Cong. Rec. 2602). The debate involved consideration of the motivation behind the 1880 Act, including these comments with respect to the Southern Utes: After the "Meeker massacre," the Uncompahgre and White River Utes

> ". . . were hurried off to the Uintah Reservation in Utah, the Southern Utes remaining upon this southwestern strip.
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> "Then 1880 negotiations were had looking to the confining of the Southern Ute Indians some specific

[48] Report of the Commission, Sen. Ex. Doc. 67, 50th Cong., 2d Sess., January 14, 1889, p. 6. The Commission spent almost four months negotiating with the Southern Utes.

reservation. A commission was appointed, and in 1880 this present reservation was made the permanent home and the exclusive abode of the Southern Ute Indians." [49]

A House Committee Report in 1893 on S. 1234 explained that the 1880 Act "provided for the removal of the Ute Indians (except the southern branches of the tribe) from Colorado." H. Rept. 2487, 52d Cong., 2d Sess., p. 1.

By 1894, the appropriate committees in Congress appeared to have abandoned the proposal to remove the Southern Utes to the Territory of Utah and chose, instead, a course of action which contemplated allotments in severalty on the Southern Ute Reservation. This was epitomized in H.R. 6792, a bill introduced by Congressman Hunter of Illinois. 26 Cong. Rec. 4015. The House Report (H.Rept. 799, 53d Cong., 2d Sess.) recommended "allotment of lands in severalty to all who may elect to take them" if deemed by the Secretary of the Interior qualified "to sustain themselves in a changed position in which they would be placed after taking lands in severalty." *Id.*, at 3.[50] This bill appears to have been the first one to provide for establishment of a separate reservation for the unallotted Southern Utes in the western end of their 15-mile strip. *Id.*, at 3. This bill was passed by the House. 26 Cong. Rec. 6232. When it was debated in the Senate, Senator Teller, in charge of the bill, explained that it "simply carries out the Treaty of 1880, with modifications." He explained that the Southern Utes might select allotments and those not selecting were to be settled on the western end of their existing reservation. 26 Cong. Rec. 6388.

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[49] 23 Cong. Rec. 2636. This was the explanation by Senator Wolcott, who also explained that Senator Teller, in 1880, had protested against the assigning of the Southern Utes to the Southern Ute Reservation.

[50] The Committee was well aware of the fact that the Southern Utes theretofore had been occupying the 15-mile strip as an Indian reservation.

This debate revealed a difference of opinion between Senator Teller and Senator Vilas, the latter being the Secretary of the Interior at the time of the 1888 Agreement. Senator Teller maintained the 1880 Act provided only that the Indians were to be allotted in severalty, and the remaining lands were to be sold. Senator Vilas expressed the opinion that the Act of 1880 created a reservation for the Southern Utes. 26 Cong. Rec. 6388. H.R. 6792, as amended, was adopted by both Houses and became law during the third session of the 53d Congress upon approval by the President on February 20, 1895. 28 Stat. 677.

Any fair analysis of the legislative history of the Acts of 1880, 1882, 1888 and 1895 must lead to the conclusion that the Southern Ute area was reserved for them by the 1880 Act; their ownership was further recognized by the Acts of 1882 and 1888; and the land was unqualifiedly treated as Southern Ute property by the Act of 1895.

E. *The Claims in Suit Were Not Involved in Any Prior Ute Litigation*

Although the government does not seriously contest the fact that neither the Southern Ute Tribe nor any other Ute Indian group for that matter has ever been paid for the free homestead land involved in this case, the defense of *res judicata* against failure to make payment for lands taken in violation of the 1895 Act is based on an erroneous interpretation of the Act of 1880 and prior litigation involving rights of the Confederated Bands of Ute Indians jointly. While pointing to other cases during previous stages of this proceeding, the prior cases primarily relied on at this time are Court of Claims No. 46640, *Confederated Bands of Ute Indians* v. *United States*, 117 C.Cls. 443, and for historical perspective, No. 30360, *The Ute Indians* v. *United States*, 45 C.Cls.

440.[51] *Supra*, pp. 10-11, 13-16. These cases, says the government, dispose of the present claim of the Southern Ute Tribe alone by *res judicata*, or, perhaps more accurately, collateral estoppel.[52] But whichever court-made rule of repose is advanced, the government is equally wrong on either count.

Classically, the principal elements which determine whether the present claims are barred are: were the parties to the prior suits the same and were the issues (and necessarily the facts to establish them) the same. Here, they were not. The elements and the test of application have been stated by this Court in *Tait* v. *Western Maryland Ry. Co.*, 289 U.S. 620, 623:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353; *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48; *United States* v. *Moser*, 266 U.S. 236, 241."

We have previously reviewed the pertinent litigation by the Confederated Bands of Ute Indians involving

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[51] The government identifies the confederation of Uncompahgre, White River and Southern Ute Tribes as the "Confederated Band of Ute Indians." Br. 4. This confederation has always been known as the "Confederated Bands of Ute Indians." It is so listed by the government in its table of citations. Br. ii. Counsel is not aware that any legal significance attaches to this change in name adopted by the government.

[52] We are inclined to the view that the distinction in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326, is correct if the doctrine is applicable at all.

rights under the 1880 Act. *Supra*, pp. 10-17. The Southern Utes (Capote, Muache, and Weeminuche Bands as of 1880 and later) were a constituent part of the Confederated Bands and were so treated from at least the Treaty of 1868 in which those bands reserved for themselves the western portion of Colorado, 15 Stat. 619. The Southern Utes shared in the judgments of all cases brought by the Confederated Bands in an amount usually proportionate to the percentage their population bore to the entire confederation.

This is the one and only suit brought by the Southern Ute Tribe as a party for its own interest in the 15 by 100 mile strip reserved, as we say, by that tribe pursuant to the Act of 1880 and disposed of for its sole benefit by the United States as authorized by the Act of 1895. No other bands of the Confederated Utes have claimed an interest in the Southern Ute Reservation, and any award in this claim would go to the Southern Ute Tribe alone.[53] Each of the prior cases, in which the Southern Utes were a constituent part of the Confederated Bands in an adversary posture with the United States, involved lands outside the 15-mile strip and interests which the bands shared jointly, with the exception, as yet undetermined in amount, of the 1910 accounting case. *Supra*, pp. 10-11. Thus, the parties in all prior cases were different. That difference is between the joint and sole ownership of Indian lands and money.

The issues in this claim are not the same as the prior claims of the Confederated Bands. All prior litigation turned on rights under the Act of 1880 and the accrued monetary interests as therein provided. Upon disposal of lands under the Act of 1880, but first "sacredly" reimbursing itself for certain pro-governmental expendi-

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[53] The government and one dissenting judge of the Court of Claims have been led to believe that there was a defect in parties in the present claim. The issue has been decided to the contrary and has not been challenged. Br. 4, fn. 1; 37, fn. 18.

tures assertedly benefitting the Indians, it was provided that "the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians" with interest. Br. 47. Plainly, the "said Indians" were the joint beneficiaries of the agreement ratified and amended by the Act of 1880—which included the Southern Utes as a constituent part of the Confederated Bands. But the beneficiaries were jointly the Confederated Bands.

The 1895 Act is different. The clear import of the 1895 Act, so far as the 15-mile strip is concerned, is that it completely accorded to the Southern Utes the total ownership interest in the lands opened to public entry and moneys received under its provisions as opposed to the lands opened by the Act of 1880. No other construction can be made of the 1895 Act.

On this basis, the Southern Ute Tribe sued for the proceeds of land disposed of in the Southern Ute Reservation (the accounting claim for 82,000 acres) and payment for the 230,000 acres of free homestead lands, which the United States had disposed of in violation of the 1895 Act which required the payment of $1.25 per acre for that kind of land. A. 134-5. Thus, the element of identical issues for *res judicata* is not present. There was no issue in any of the prior litigation raised or pleaded or which could have been raised that the Confederated Bands were entitled to compensation for or the proceeds from the lands in suit opened under the 1895 Act.

In its treatment of prior Ute litigation (Br. 10-13, 24-29), the government quotes some general language of this Court and the court below as to what it thinks is involved in the Act of 1880. With the possible exception, as we point out, of *part* of the 1910 accounting claim, every other citation is to *dicta*. Br. 25. The Executive Order lands claim (Br. 11-12, 25; *supra*, p.

16) was for compensation for lands in which the Confederated Bands were held to have no compensable interest. Nothing remotely akin to this 1895 Act claim for lands and proceeds held in trust for the Southern Utes was before the Court in that case. And the language cited cannot be the predicate for *res judicata*. *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 278-9; *Mutual Orange Distributors* v. *Agricultural Prorate Com'n.*, 30 F.Supp. 937 (S.D. Cal., 1940).

In its reaching to convince this Court that the Act of 1880 ceded all Ute lands in Colorado, including the 15-mile strip, the government goes so far as to claim that a brief filed by counsel for the Confederated Bands in the Executive Order case just mentioned supports this interpretation. Br. 11-12. Its citation is to a brief filed on behalf of the Confederated Bands in this Court, No. 141, O.T., 1946, pp. 8-9 and 15-16. As the government acknowledges, the remarks were made in another context. But even so, they hardly support the claim made by the government in any event. The briefs cited are to the same Executive Order lands claim. *Supra*, p. 16. That case involved no question under the 1895 Act, and the Act of 1880 was primarily important for historical purposes. With respect to the effect of the 1882 Act, the brief on behalf of the Confederated Bands had the following to say:

> "Subsequently, the lands to be allotted to the individuals not having been selected, doubts existed whether settlers could make entry of the lands in the former reservation in Colorado. To remove these doubts, Congress declared by the Act of July 28, 1882, . . . that the lands formerly occupied by petitioner bands other than those set apart for the Southern Utes by the Agreement of 1880, were 'public lands of the United States,' subject to disposal in accordance with the agreement of 1880."

(Brief for petitioners, p. 9; see also Petition for Certiorari, p. 7).

Elsewhere in the brief are cautious and accurate statements to the effect that the Act of 1880 operated as a cession in trust for the benefit of the Indians.

Lastly, but by no means least, none, not one single acre, of the 230,000 acres given free as homesteads in violation of the 1895 Act was paid for in any of the prior litigation, and the government is well aware of this fact. The judgment in No. 46640 which is for the most part completely relied upon for *res judicata* did not cover the 1895 Act land disposals. It is a mathematical certainty that no money in that judgment was for these 230,000 acres. *Supra*, pp. 13-16.

To escape its obligation to pay for the taking of the 230,000 acres, the government relies on a single sentence in the 1950 stipulation in No. 46640 as its juridical *res*. That sentence, quoted by the government without reference to the whole (Br. 20), provides that the 1950 judgment was *res judicata*[54]—

> ". . . not only as to the land described in Schedule 1, but whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant . . . sold for cash, disposed of as free homesteads and set aside for public purposes."

The two dissenting judges in the court below accepted this language as dispositive of the issues here presented and the government's position before this Court stands on that cornerstone (Br. 24-29). It is that sentence,

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[54] By merely using the term, we would think today that the parties were correctly using it to mean the exact lands on which the computation was based and not other lands involving an owner different from the joint beneficiaries of that award.

quite reasonably a catch-all, on which the government hangs its entire defense.

An examination of the face of the stipulation shows that the subject 230,000 acres could not have been included in the catch-all sentence. If the Southern Ute Reservation, including the 230,000 acres of subject land, had been ceded under the Act of 1880, then surely that Act, coupled with the amendments of the Act of 1882, would have been the authority for the United States to dispose of the lands and thus create for itself the obligation to account for proper dispositions and a liability for improper disposals. The subject 230,000 acres were not disposed of under the Act of 1880, but under the Act of 1895. Since the government did not dispose of the 230,000 acres under the Act of 1880, there was no wrongful disposition for which it could be liable, as it was for the 1.6 million acres paid for in No. 46640.

The claim in No. 46640 was not for the loss of the Southern Utes' right to lands and proceeds under the 1895 Act, but for the Confederated Bands jointly for lands and proceeds under the 1880 Act, and it was that action, and that action only, which was settled by the 1950 stipulated judgment. *Supra*, pp. 13-16.

The government must have looked at Case No. 46640 the same way. At the time the basic litigation under the 1938 jurisdictional act was pending, the Secretary of the Interior on September 14, 1938, pursuant to the recently passed Indian Reorganization Act of June 18, 1934, 48 Stat. 984, moved to restore to the ownership of the Southern Ute Tribe all of the lands which had been opened to entry under the 1895 Act but which still in 1938 had not been disposed of. The order of restoration is revealing. *Supra*, p. 9. It provides as follows:[55]

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[55] *Indian Affairs, Laws and Treaties*, Vol. V, p. 659, Charles J. Kappler.

> "... pursuant to the provisions of the Act of February 20, 1895 ... the *Southern Ute Band* of Indians in Colorado *ceded* to the United States a large area of *their reservation* in the State of Colorado *established expressly* for their benefit *under the treaty of June 15, 1880* ..."

The court below accorded this 1938 statement in the restoration order great weight. A. 85. It was not the only such statement indicating that the Secretary of the Interior construed the 1895 Act as ceding the Southern Ute Reservation. As early as 1903, the Acting Secretary of the Interior had held that the Southern Ute Reservation was in fact created by the Act of 1880 and the 1895 Act alone made those lands subject to disposal. *Hiram M. Hamilton*, 32 L.D. 119. Referring to the proper manner of disposing of the opened Southern Ute Reservation lands, the Acting Secretary stated (*Id.*, at 119):

> "*The tracts* in question *are* within the territory included in the Ute Indian reservation established by the treaty of March 2, 1868 (15 Stat., 619), and *within the reservation, established in pursuance of the provisions of the agreement with said Indians, approved by the Act of June 15, 1880, supra, for the Southern Utes.* They never came under the operation of the provisions of said act of 1880 in respect of the disposal of the lands ceded by the agreement thereby ratified."

A further example of this consistent interpretation is shown in the Secretary's regulations under the 1920 Mineral Leasing Act, 41 Stat. 437, 30 U.S.C. 181, *et seq.* The regulations specifically excluded Indian reservations. But the Secretary held that the lands ceded by the Confederated Bands by the Act of 1880, and opened to settlement by the 1882 Act, were subject to the Mineral Leasing Act as public lands. *Frank A. Kemp*, 47 L.D. 560. The first regulations under the 1920 Mineral Leasing Act specifically included the "ceded Ute Indian lands" as subject to leasing, as well as other Ute lands. *Oil and*

Gas Regulations, March 11, 1920, 47 L.D. 437, 474. But once again, the Southern Ute Reservation lands were conspicuously absent from the lands identified as ceded by the Act of 1880.

The position of the three Secretaries was completely consistent and was made directly in response to issues affecting the Southern Utes under the Act of 1880 and the 1895 Act. It reflects consistent administrative construction of the two acts of Congress by the administrative officers charged with carrying out the provisions of the acts. As such, the administrative interpretation is entitled to considerable weight.

F. *Any Ambiguity or Uncertainty in the Act of 1880 Must be Resolved in Favor of the Southern Utes*

This is not an ordinary suit. Here the United States sits in a dual capacity. The United States on the one hand has its role as guardian of its dependent Indian wards and as trustee of their property; on the other hand, the United States is defending itself on charges of wrongdoing. Different policies control the two functions and the governmental officers on each side have different obligations.

In this case, the United States is dealing with Indian wards to whom it owes a special obligation. By law, the tribe was prohibited from selling to anyone but the United States (Act of July 22, 1790, c. 33, 1 Stat. 137) and, by law, the United States has the obligation to administer the property of its wards for their advantage.

The principles governing disputes between the United States and its tribal wards are well summarized in *Choctaw Nation* v. *United States*, 119 U.S. 1, 28, where the Court stated:

> "The recognized relation between the parties to this controversy, therefore, is that between a supe-

rior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. *The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right*, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws."

In varying form, this same view has been expressed in numerous decisions of the Court. Speaking of the Shoshone Tribe, the Supreme Court made the judicial pronouncement that it is "the settled policy of the United States fairly to deal with Indian tribes." *United States v. Shoshone Tribe*, 304 U.S. 111, 116. More specifically, the Court directed that in dealings between the United States and its wards concerning property all doubts are resolved in favor of the Indians. The Court stated (304 U.S., at 116, 117):

> "[116] . . . In treaties made with them [Indian tribes] the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. *They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.* . . ."
>
> "[117] . . . As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe."

In language applicable here, this was reiterated in *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 354, where this Court declared:

> ". . . But an extinguishment [of title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate* v. *Trapp*, 224 U.S. 665, 675, the rule of construction recognized *without exception* for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.' "

In *Minnesota* v. *Hitchcock*, 185 U.S. 373, 402, the Court made it "a *duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress.*"

And as long ago as 1832, Mr. Chief Justice Marshall stated the controlling precept in *Worcester* v. *Georgia*, 6 Pet. 515, 582, that: [56]

> "The language used in treaties with the Indians should *never* be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

If there is uncertainty or ambiguity concerning the question whether the Southern Ute Reservation was "reserved" or set apart or recognized by the agreement and Act of 1880, then the Congressional action taken with annual knowledge of administrative recognition that the 15-mile strip belonged to the Southern Utes must be construed in the manner favorable to the Southern Utes.

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[56] Quite recently, Chief Justice Marshall's words in *Worcester* v. *Georgia* were reaffirmed by this Court in *Squire* v. *Capoeman*, 351 U.S. 1, 6-7.

Particularly is this true where the meaning the Indians attributed to the agreements or acts is called to question. *Menominee Tribe* v. *United States*, 391 U.S. 404, 406; *United States* v. *Winans*, 198 U.S. 371, 380-381. In *Winans* (198 U.S. at 380-1), the Court said:

> ". . . [W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right *without regard to technical rules.*' "

The Southern Utes alone owned the 15-mile strip at all times after 1880. What other conclusion can be reached when considering the entire web of events between the Southern Ute's ratification of the Act of 1880, their Congressional hearing in 1886, their cession agreement of 1888, and the provisions of the Act of 1895 passed for their sole benefit. *Supra*, pp. 20-40. Any other construction of the Congressional action would fly directly in the face of precepts set out by the Court without exception.

II. Respondent Is Entitled to a True, Complete and Proper Accounting to the Date of Judgment for Trust Funds Derived from the Sale by the United States of Approximately 82,000 Acres of its Land and Interests

The respondent pleaded a claim for an accounting of the proceeds from approximately 82,000 acres disposed of by the United States pursuant to the 1895 Act, and prayed that the government "render a true, complete and proper accounting" for those trust funds. A. 13.[57]

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[57] Throughout its brief, the government pointedly criticizes respondent for filing the original petition before the Indian Claims Commission a mere three days before the cut-off date and filing twelve years later pleadings on the accounting claim. The govern-

The government did supply, on February 18, 1953, a report of the General Accounting Office (GAO) purporting to furnish that accounting. In its May 29, 1956 answer to the petition, the government's defense to the accounting claim (other than a general denial) was *res judicata*. A. 14-15. The following years to November 4, 1960, were consumed with motions for summary judgment on certain issues. These motions were denied by the Indian Claims Commission. A. 1. Thereafter, on June 12 and September 30, 1963, the respondent filed exceptions to the GAO report in preparation for the scheduled hearing held by the Indian Claims Commission on October 8-9, 1963. A. 19-23.

A. *The Petitioner Must Furnish a Complete and Proper Accounting*

Section 4 of the 1895 Act authorized for the first time the disposal by the United States of lands "within the present reservation" of the Southern Utes and Section 5 of that Act provided that "the money realized from the sale of lands, . . . shall be held in the Treasury of the United States in trust for the sole use and benefit of" the Southern Ute Indians. A. 134-6. The relationship of the parties under the 1895 Act thus ". . . was special and from it there stemmed a special responsibility." *Oneida Tribe* v. *United States*, 165 C.Cls. 487, 493-494; *cert. den.*, 379 U.S. 946; see also *Navajo Tribe* v. *United States*, 176 C.Cls 502, at 507. When the government

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ment seems to be implying that the exceptions were afterthoughts of counsel. Br. 29-30. They were not, of course, and we suppose that if the original petition had been filed on the first or the last day the Commission could have received it, and if the exceptions to the GAO report had been filed the day after the respondent received it, these issues would nonetheless be the same. The government filed approximately 15 motions for extensions of time to answer the petition between 1951 and 1956.

promises to sell lands in their "present," *i.e.*, existing, reservation for the trust account of the Southern Utes, "The law requires what is called uberrima fides, the highest good faith, in matters of this kind." *Ottawa Tribe* v. *United States*, 166 C.Cls. 373, 380; *cert. den.*, 379 U.S. 929.

The respondent's exceptions to the 1953 GAO report, contrary to the government's theory, raise accounting issues entirely related to the claim pleaded. Each of the exceptions, save one, goes straight away to the government's mishandling of the trust funds derived from disposals of the 82,000 acres of Southern Ute reservation land under the 1895 Act, as revealed by the GAO report prepared on this claim. The exceptions assert in this accounting claim principles long established in cases involving Indian trust funds collected by the United States from the disposals of tribal lands and natural resources. The exceptions simply make specific the government's mishandling of respondent's money as shown from the incomplete GAO report in this case. Since the petitioner never tells the Court what the exceptions cover, except for one item which was actually rejected by the Indian Claims Commission and affirmed by the court below, we are constrained to detail in somewhat more length than might otherwise be thought necessary the exactness with which the exceptions apply to the pleaded claim.

1. *The United States owes respondent a duty to conserve, make productive, and protect its trust funds.* The petitioner is duty-bound in the course of prudent management of Indian trust funds to conserve such funds by using noninterest-bearing funds ahead of any interest-bearing funds and by using those bearing a lower rate of interest ahead of those bearing higher rates of interest. If this duty is not fulfilled, there is an obligation to reconstruct the account and to pay the respondent the

amounts lost. *Menominee Tribe* v. *United States*, 101 C.Cls. 10, 20-1. As an integral part of its duty to conserve runs a duty to make trust funds productive, which is fulfilled by depositing the collected proceeds promptly in interest-bearing accounts, where the law requires the payment of interest, and to continue to pay interest until the funds are actually spent for the benefit of the tribal ward. *Ibid.*; *Menominee Tribe* v. *United States*, 107 C. Cls. 23, 33. If interest is not paid as required by law, the government is obliged to recompute the account and credit the amount so lost. *Sioux Tribe* v. *United States*, 105 C.Cls. 725, 801-2.

Protecting the trust fund means, among other things, that the government must expend the money for the account and benefit of its Indian ward and not spend such funds for governmental functions of its own which by law it is required to maintain in any event. *Sioux Tribe* v. *United States*, 105 C.Cls. 725, 801-2; *Cherokee Nation* v. *United States*, 102 C.Cls. 720, 766-8; *Menominee Tribe* v. *United States*, 101 C.Cls. 10, 20-1; and see *Menominee Tribe* v. *United States*, 118 C.Cls. 290, 326-7.

It was these general principles which guided the Commission, and no doubt the court below in its affirmance, when it entered its ultimate Finding 20 on the accounting matter as follows (A. 35-6):

> "20. Petitioner [Southern Ute Tribe] is entitled to recover the total amount by which its funds would have been increased (1) through the payment of interest at 5% per annum, beginning not later than 30 days after the money came into defendant's possession, on moneys received by defendant from sales of petitioner's lands; (2) through the payment of interest at 4% after July 1, 1930, on any other interest-bearing moneys until actually expended by the defendant for valid purposes; (3) if the erroneous transfers acknowledged by defendant had not

been made; and (4) through expenditures from noninterest-bearing moneys before expenditures from moneys which earned or should have earned interest."

Examples of each of these breaches by the government, as shown by the GAO report in this case, were supplied by respondent in the form of "exceptions" shortly before the 1963 trial before the Indian Claims Commission.

a. *The government failed to deposit the Tribe's trust funds promptly upon receipt as required by law. Exception 1. A. 19.* If the Tribe's moneys had been promptly credited to the appropriate interest-bearing account, they would have become productive without undue delay and within the 30 days heretofore adjudicated to be reasonable for the government to get "through the entire maze of administrative red tape preliminary" to depositing money in the United States Treasury.[58] Because the GAO report in this case does *not* show when the funds were received or actually deposited, and additionally shows that over thirty years passed from the time some of the funds were deposited before the government began paying any interest, the Commission ordered the government to supply the deposit-date information, "insofar as the records will permit." A. 48.

b. *The government failed to pay interest on interest-bearing funds up to the time such funds were actually spent. Exception 2. A. 19.* As an administrative practice, the government stops the payment of interest on interest-bearing funds when they are "transferred" to a disbursing officer's account, even though such funds are still on deposit in the Treasury and the actual expenditure of the funds may come at a much later date

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[58] *Menominee Tribe* v. *United States*, 107 C. Cls. 23, 33. The Court of Claims has held that there is an implied agreement on the part of the United States to deposit such funds promptly and that 30 days is a reasonable time to accomplish this. The Commission followed that ruling for this case. A. 48.

or not at all.[59] During this time, the government has the free use of the Tribe's money. The failure to pay interest up to the time the trust funds are actually spent caused a loss to the Tribe and violated the government's duty to keep the trust funds productive. *Supra*, pp. 53-4. On this record, the Commission held that the government was under a duty to furnish the deposit-withdrawal dates so that the correct interest-bearing time periods could be computed, "insofar as possible." A. 48-9.

c. *The government failed to pay interest on the trust funds as required by law. Exception 3. A. 19.* On its face, the 1953 GAO report shows that land sale proceeds had been collected pursuant to the 1895 Act starting on April 13, 1899, and that it was not, strangely enough, until after February 12, 1929, that any interest was paid on these funds. A. 136-9.[60] Federal law provided that interest at five per centum per annum be paid on all such funds.[61] The Commission ordered the government to calculate the amounts due on the principal accounts at a 5% interest rate. A. 32-3, 35-6, 49. The government has paid interest at the 5% rate on the trust land proceeds of other Indian tribes.[62] The Commission thus

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[59] Testimony of Mr. Charles W. J. Lenard, the supervising examiner, Office of Administrative Services, General Accounting Office, charged with preparing the 1953 GAO report in this case. Tr. 101-2, 107-118, October 8, 1963, Indian Claims Commission.

[60] The Commission found that between July 26, 1899, and June 30, 1928, a total of $215,977.58 had been collected from Southern Ute land sales and that no interest had been paid on those proceeds until January 31, 1930, when the government began to credit interest at a rate of 4% per year on then existing balances. A. 31-32. See 1953 GAO report, A. 136-9.

[61] Indian Trust Funds Act of April 1, 1880, 21 Stat. 70, 25 U.S.C. 161; Five Per Cent Interest Act, R.S. § 3659 (Act of September 11, 1841, 5 Stat. 549).

[62] The Commission so found (A. 33). See the testimony, from personal knowledge, of Mr. Lenard, the GAO supervisor in charge, in this case. Tr. 119-24, 146-7, October 8, 9, 1963, Indian Claims Commission.

ordered the government to furnish the accounting so that the Indians might check the results and compute the loss occasioned.[63]

d. *The government unlawfully transferred the Tribe's trust funds to the credit of other Indians. Exceptions 4, 5. A. 19.* In at least three instances, and by its own admission, the government wrongfully transferred money belonging to respondent to the credit of other Ute Indian tribes. A. 35, 49. Not only was the transfer unlawful, but the respondent lost the money and the interest on it. Surely, this is subject to correction through a proper accounting.

e. *The government spent the Tribe's trust funds for unauthorized purposes. Exception 6. A. 19-20.* Rather than spending the Southern Ute's trust money for the benefit of the Tribe, the government spent the money for itself. It spent the money for such governmental functions as routine agency expenses, the maintenance of law and order, construction of roads and bridges, agricultural aid and demonstration projects, and the pay of agency employees—expenditures which the government would otherwise pay from its own funds. These classes of allegedly wrongful expenditures were detailed by both the respondent and the Commission. A. 19, 34. Since the government has not replied to this exception by showing the legality of the expenditures challenged, the Commission merely ordered the government to sustain their legality without any presumption of wrongfulness. A. 49-50.

f. *The government failed to conserve the Tribe's interest-bearing funds. Exception 7. A. 20.* The government is obliged to reconstruct accounts, and to repay the

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[63] In addition to the actual payment in other cases the Commission's action was based on *Sioux Tribe* v. *United States*, 105 C. Cls. 725, 801-2; *Wootton Land & Fuel Co.* v. *Ownbey*, 265 Fed. 91, 99-100 (C.A. 8, 1920).

losses if any, when it spends interest-bearing funds before noninterest-bearing money or where it spends higher rate interest-bearing funds before it spends funds earning a lower rate of interest. Otherwise, the government would be enriching itself at the expense of its Indian ward. An indication of the government's failure in these matters is found in the GAO report which, among other things, shows that as of June 30, 1951, there was far more money in the "Interest on Proceeds" account, which is noninterest bearing, than there was in the "Proceeds" account, which is interest-bearing, although both accounts were indeed small by that date. A. 138-9. The Commission ordered the government to restate the account with appropriate information in the supplemental accounting. A. 50-1.

Because of petitioner's dearth of argument on these primary exceptions to the GAO report, we are led to assume that the petitioner may be in agreement with us that the accounting ordered by the Commission, and affirmed by the Court of Claims, on these itemizations is proper. Br. 29-30. If our assumption is correct, then only one item is really at stake in the government's attack on the accounting exceptions.

All of the exceptions, save possibly this one, were specifically directed at the land sales proceeds and the Commission's opinion in this case called only for "a further and complete accounting from defendant [United States] with regard to those items questioned by petitioner [Southern Ute Tribe] in its exceptions." A. 46-47.

g. *The government failed to include all land proceeds. Exception 8. A. 22.* The single exception which the petitioner cites to this Court as going beyond the original petition filed with the Indian Claims Commission called for the payment of 5% interest on tribal funds in an account styled "Indian Moneys, Proceeds of Labor, Southern Ute Indians" (IMPL). Deposits to this account began in 1892 and to the extent that any interest was

paid, it was paid at 4% under a 1930 statute beginning in 1931. A. 33-4, 143-7. Respondent's exception on this item was *rejected* by the Commission. A. 51-2. The court below affirmed. A. 97.

Even though the government has never previously pointed to a specific example where it thought our exceptions were not covered by the petition before the Indian Claims Commission, it is difficult to see how its citation of the rejected exception for interest on a complicated tribal trust fund is an example of "funds unrelated" to the accounting claim. Br. 31. The government recognizes that this fund has in it some tribal trust funds subject to this accounting, but it urges that the issue be by-passed. Br. 31, fn. 7. That suggestion is possibly correct. But from our point of view, it seems plain that the Tribe's IMPL money was embraced within the original petition before the Indian Claims Commission.

Through the years, tribal IMPL funds have received rather shabby treatment at the hands of the Department of the Interior, and a word of history concerning the fund "Indian Moneys, Proceeds of Labor" may help. To start with, the Act of March 3, 1883, 22 Stat. 582, 590, provided that "The *proceeds* of all pasturage and sales of timber, coal, or other product of any Indian reservation . . . and *not* the result of the labor of any member of such tribe" were to be deposited in the Treasury for the benefit of that tribe. Within a few years, Congress enlarged the discretionary powers of the Secretary of the Interior over the use of IMPL funds,[64] and today, the IMPL account represents a variety of "miscellaneous revenues" of Indian reservations which are rarely, if ever, the proceeds of Indian labor.[65]

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[64] Act of March 2, 1887, 24 Stat. 449, 463.

[65] The basic statutes and amendments establishing the IMPL account are codified at 25 U.S.C. 155.

These funds, or a portion of them, represent the proceeds collected by the United States from the disposition of interests in an Indian tribe's natural resources and other property. In the case of the Southern Utes, those proceeds were rentals and royalties from mineral and grazing leases, payments for railroad and other rights-of-way across tribal lands, sales of agricultural products, timber, water, and livestock, penalties for trespasses on tribal lands (usually grazing), and the sale of miscellaneous property which may or may not have belonged to the Tribe. A. 145-6. Of the net of $19,124.22 assertedly collected, in excess of $15,000 was derived from these categories of disposals of interests in Southern Ute reservation lands.[66] There is nothing to indicate at this stage that this money was from a land base other than the one called to account in the original petition before the Indian Claims Commission.

We would observe that the 1951 petition filed with the Indian Claims Commission pleaded for an accounting of proceeds collected by the United States from some identifiable disposals of Southern Ute reservation lands —disposals which sounded in the main as conveyances of fee simple titles to third persons and the money paid by such persons for those lands. The GAO report in this case purports to contain an accounting of proceeds during the period February 20, 1895, to June 30, 1951, together with interest from February 12, 1929. A. 132. The GAO report went on to state that accountings cover-

[66] The sources listed make up the bulk of the IMPL funds involved in this case, although some small amounts were also collected from the sale of property and services other than interests in tribal lands (A. 146-7, 33-4). Of the total $19,124.22 collected between May 13, 1892, and June 29, 1940, all but $3,461.80 was derived from such interests. A. 145-6. By statutory definition, these are trust funds. Permanent Appropriations Repeal Act, 1934, 48 Stat. 1233, 31 U.S.C. 725s(20). Interest on this account, amounting to $219.47 was paid for the period January 9, 1931, to January 31, 1935. A. 33-4, 51-2, 146; Southern Ute Exhibit 25, pp. 504, 659, in the original papers.

ing the period February 20, 1895, to December 31, 1946, were also included in GAO reports dated June 24, 1949, and March 12, 1951, in Court of Claims Nos. 46640 and 47567, *Confederated Bands of Ute Indians* v. *United States*. A. 132. See discussion, *supra*, pp. 13-17.

Examination of the 1951 GAO report in Case No. 47567 developed that money had also been collected by the United States for the disposal of interests in the Southern Ute reservation lands amounting to less than the fee simple titles and that this money was posted on a set of ledgers maintained by the Department of the Treasury separate from the money collected and carried as proceeds under the 1895 Act. If the 1953 GAO report for this case had shown directly rather than by reference the total proceeds from all interests in Southern Ute reservation lands instead of the receipts from the fee simple title disposals only, that report would also have contained the information regarding IMPL funds and much of the controversy might have been avoided or decreased.[67]

The fact that through ancillary investigation, the Tribe's counsel became aware that money had been collected from disposals of interests in Southern Ute lands but reported by reference and not directly in the GAO report in this case ought not be turned against the Tribe at this late date on the government's contention that a "new" claim "unrelated" to the proceeds of land accounting has run afoul of the statutory limitation in Section 12 of the Indian Claims Commission Act. 25 U.S.C. 70k. We are led only to wonder at this juncture in what other ledgers at the Treasury are posted funds

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[67] Pertinent portions of the GAO reports in Court of Claims No. 47567, *Confederated Bands of Ute Indians* v. *United States*, were introduced in evidence in this case as the Tribe's Exhibit 25 and Case No. 46640 as Defendant's Exhibit 21, under Rule 31 of the Commission providing for admission in its cases of evidence in other cases. 25 CFR 503.31.

from the Tribe's lands which were not disclosed in any GAO report.

The petitioner chides us for including the IMPL money at all as a chance discovery without suggesting that it relates to the proceeds of land accounting. Br. 31. We do not know what more could have been done after we became aware that the $19,124.22 IMPL credit had been earlier set up in another set of books, although those books were referred to in the GAO report for this case. A. 132. This case was then set for trial on liability and we had filed our primary exceptions to the GAO report. Briefing had not commenced. Upon analysis, the IMPL funds appeared to be principally proceeds from the disposals of interests in Southern Ute tribal lands starting in 1892 and interest on the money was not credited until 1931—and then under the same statutory authority that the government used to credit interest to the proceeds of land fund covered by the GAO report in this case.[68] In both GAO reports the government's treatment of the two accounts was identical—only the titles of the ledgers were different. What the petitioner means by telling the Court that an IMPL account cannot "ordinarily" be expected to have land disposal moneys in it indicates only that—like the book and its cover—the titles of the ledgers are not indicative of the source of the funds or their use. And this is precisely why a true, complete and proper accounting is necessary.

While our exception seeking payment of 5% interest on tribal IMPL funds from the beginning was rejected by the Commission (A. 51-2), respondent's exception going to the expenditure of such funds for purposes other

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[68] The authority of the United States to collect the two funds was the 1895 Act (Proceeds of Sale) and the 1883 Act (IMPL), and the authority for the payment of interest cited in both instances is the Act of June 13, 1930, 46 Stat. 584 (25 U.S.C. 161a, 161b). A. 137-139; 45-8.

than the benefit of the Tribe is outstanding. A. 22, 52-3. An additional word of history will show why this exception is eminently proper.

Through the years after the 1883 Act (22 Stat. at 590) when the discretionary power of the Secretary of the Interior was enlarged (*supra*, pp. 59-60), "A practice developed" at the Department of the Interior to deposit the miscellaneous revenues of the entire reservation to the IMPL account, which the Superintendent of the reservation then disbursed. Complaints from the Indians on the spending of these moneys became so intense that an investigation was made by the General Accounting Office. In a report on Indian funds dated February 28, 1929, the Comptroller General stated that the Indian agents exercised "absolute control and almost indiscriminate use of these funds," and a sample of the kinds of uses proved the Indians had a valid complaint.[69] IMPL funds "were being used for such purposes as the purchase of . . . furniture, rugs, draperies, etc., for employees' quarters, papering and painting the superintendant's house, and the purchase of automobiles . . . ." All this led the Comptroller General to conclude that the practice of handling IMPL funds by the Department of the Interior "brought about a very broad interpretation of what constitutes 'the benefit' of the Indian."[70]

Despite the protestations of the government, we have *never* sought a general accounting for *all* funds of the Southern Ute Tribe in this case. We have *never* attempted to transmute this claim into such a general accounting as was implied in the petition for a writ of certiorari in this case (Pet. 10), or sought "a broader,

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[69] The Comptroller General's report to Congress is found in S. Doc. No. 263, 70th Cong., 2d Sess. (1928-9), pp. 39-40. The IMPL account problem is described in *Federal Indian Law* (GPO), pp. 66-7, and in *Handbook of Federal Indian Law*, pp. 106-107, by Felix S. Cohen, referred to by this Court as an "acknowledged expert in Indian law," in *Squire* v. *Capoeman*, 351 U.S. 1, 8-9.

[70] S. Doc. No. 263, 70th Cong., 2d Sess., p. 39.

general accounting" as suggested by the petitioner. Br. 35. We did and do seek "a true, proper and complete accounting" of the funds questioned in the 1951 petition filed with the Indian Claims Commission and amplified by the 1963 exceptions to the GAO report.

2. *Respondent's exceptions to the GAO report are pleadings which relate to specific issues in this case.* What appears to confuse the petitioner is the procedure of the Indian Claims Commission in disposing of the merits of this accounting claim. The Commission is essentially an administrative tribunal, sitting as both hearing examiners and decision makers,[71] but its rules of procedure are skeletonized adaptations from the Federal Rules of Civil Procedure and the rules of the Court of Claims. Pleadings shall be construed "to do substantial justice" and leave to amend "shall be freely given when justice so requires." Rules 7(c), 13(a), 25 CFR 503.7(c), 503.13(a). The Commission's Rule 13(c) on relation back is *verbatim* from Rule 15(c), F. R. Civ. P., where the claim asserted by amendment "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth" in the original pleading. And its reception ought to be given the same liberal treatment. See *Tiller* v. *Atlantic Coast Line*, 323 U.S. 574, 580-1. This liberality would allow amendments unless there is so great a change in the material operative facts that an entirely different fact situation is presented. In the case here presented, the facts are all the same—only the figures are different. What should be kept in mind is that it is the course of the government's conduct in collecting and disbursing trust proceeds from limited sources that is being called to account. The amplification of the original complaint by exceptions, pointing out in what manner that conduct was a breach of the government's fiduciary duty, as shown by its own GAO reports, certainly does not make

[71] See, *e.g.*, H. Rept. No. 2693, 79th Cong., 2d Sess., p. 8, the Conference Report on H.R. 4497, which became the Indian Claims Commission Act.

for new or different claims. Hence, the applicability of the rule of relation back of the exceptions applies in this case.[72]

A few months before this case was being heard on liability, the Commission decided on a somewhat standardized procedure for its accounting cases. *Sioux Tribe* v. *United States*, 12 Ind. Cl. Com. 541, 547-8 (1963).[73] In its earlier years, one controversy in accounting cases at the Commission centered over which party had the burden of proof: on the one hand the petitioning Indians contended that the government had the duty of proving that expenditures and other transactions involving their funds were proper, that the funds were lawfully used for the Indians' benefit, that the GAO reports as such were not responsive pleadings to an accounting claim, and the government was obligated to answer the original petition formally; on the other hand, the government consistently took the view that a GAO report is all of a response to an accounting claim that is needed and it is the Indian petitioner who must then go forward and point out where the United States failed in its duty in handling properly the moneys involved. *Sioux Tribe* v. *United States*, 12 Ind. Cl. Com. 545-6.

Faced with this impasse, the Commission peremptorily determined the proper procedure to be followed "henceforth wherever applicable." *Sioux Tribe* v. *United States*, *supra*, p. 545. The Commission stated:

> "[546] . . . The filing of the General Accounting Office reports is a proper response to the petitions.

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[72] Whether denominated as amendments to the original petition or not, and they were so treated by the court below (A. 95-6).

[73] After the 1963 hearing of this case, the government, in its requested findings of fact and brief, evidently considered this standardization as not applicable to the case at bar, Def. Requested Fdgs. of Fact, etc., p. 47, and felt that the *Sioux* case, *supra*, was good for that date and train only. But during the trial, the Commissioners of the Indian Claims Commission at least thought the same procedure as in the *Sioux* case was being followed (Tr. 88-89, October 8, 1963).

The reports set forth all receipts and disbursements on behalf of the various tribes . . . ."

"[547] It is the opinion of this Commission that the desirable procedure to be followed in these accounting cases consists of the filing of the General Accounting Office report by defendant in pursuance of the petition along with such appropriate motion as defendant may see fit under the circumstances. Petitioner will then file in writing within ninety (90) days its specific exceptions, if any, along with its reasons therefor, to any item or items which it contends are in violation of a proper accounting and which should be disallowed. Defendant will file an answer within the usual time. The parties will then be at issue and may proceed to a hearing on the matter. This is the procedure apparently favored by the Commission in prior cases where the problem has arisen although it has never been set forth in its entirety. It appears also to be the procedure followed by the Court of Claims. See *The Sioux Tribe, et al.* v. *The United States*, 97 C.Cls. 391, 397."

The effect of the Commission's ruling was that upon receiving a General Accounting Office report, the Indian petitioners were charged with the burden of going forward by apprising the government of the specific items as shown in the report which aggrieved them. No presumption of improper conduct would run against the government and its actions would not be questioned further unless the petitioning Indians specifically itemized their objections. *Sioux Tribe* v. *United States*, *supra*, pp. 549-50. Thus the "exceptions" in this and all other accounting cases before the Indian Claims Commission constitute efforts to join issues.

The government now complains quite vigorously that respondent's "exceptions" to specific items in the GAO report are nonetheless new accounting demands barred forever by Section 12 of the Indian Claim Commission

Act providing that the Commission "shall receive claims" for five years after August 13, 1946, and "no claim existing before such date but not presented" within those five years may thereafter be submitted for consideration by any court or administrative agency or entertained by Congress. 25 U.S.C. 70k. As we have previously shown, these exceptions are not new or different claims. *Supra*, pp. 55-64.

Additionally, there are practical reasons why the Commission should be entitled to determine its jurisdiction in matters such as this and proceed with the total of the claims before it. There is no way that an accounting claim, whether general or specific, can be cut off precisely on August 13, 1946. The GAO does not keep records on that basis and the nearest fiscal year termination which could be utilized would be June 30, 1946, prior to the running of the statute, or June 30, 1947, after the running. Even December 31, 1946 would, under petitioner's view, fall to the time bar defect.

As a matter of the Commission's business, accounting petitions were generally the last claims to have been taken up for consideration. Consequently, it was several years before accounting claims really reached the Commission for consideration. Whatever guidance might have been given by the Commission in considering its own jurisdiction under accounting claims was thus delayed beyond the time when Indian claimants could protect themselves by new suits in the Court of Claims as the government suggests to this Court as the proper method of disposing of the problem. Br. 40-1.

Today, almost twenty-five years after enactment of the Indian Claims Commission Act, some Indian claimants are faced with the anomalous position of having their asserted claims sliced off as of 1946 or 1951 with the resulting loss of a claim and the potential of an award until such time, possibly, as a second suit may

be brought in the Court of Claims covering a different time period.[74]

If we understand the government correctly, it admits that this accounting claim, whether general or specific, accrued and was existing before August 13, 1946—thus running up against the limitations of both Sections 2 and 12 of the Indian Claims Commission Act. 25 U.S.C. 70a, 70k. If the government's conduct in accounting for respondent's funds after August 13, 1946, is about the same as it was before that date, this claim marches on from its first accrual. This is in the nature of a running account in that there are mutually open current dealings subject to a final balance in the future. *Cf.*, *Baggett Transportation Company* v. *United States*, 162 C.Cls. 570, 580; *Woodward* v. *Armstrong*, 73 F.2d 513 (C.A. D.C.). Rather than settle the account once and for all, as was the purpose of the Indian Claims Commission Act,[75] the petitioner would delay the final day of reckoning by chopping off as of August 13, 1946, proceedings in the Indian Claims Commission and thereafter sending the claimants to the Court of Claims for the balance of the account which, from all appearances, arises out of the same conduct from which the original cause arose. In any other proceeding this kind of suggestion would raise the specter of improper splitting of the claim.

While not stated directly, what the petitioner seems to tell the Court is that the Indian Claims Commission

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[74] See Br. 41. GAO reports prepared on accounting cases before the Commission, whether general or specific, have been certified as completed on very irregular dates. A review by counsel of representative accounting cases indicates the following: San Carlos Apache Tribe, Docket No. 22H, covering the period March 3, 1883, through June 30, 1951, was certified completed November 6, 1970; Mescalero Apache, Docket No. 22G, certified June 18, 1969; Fort Peck Tribes, Docket No. 184, certified January 16, 1960; and Northern Paiute, Docket No. 87A, certified April 25, 1963.

[75] *Klamath & Modoc Tribes* v. *United States*, 174 C.Cls. 483, 487; *Creek Nation* v. *United States*, 168 C.Cls. 483, 493.

has no *power* to act on anything which involves events after August 13, 1946. Of course, this completely ignores what the petitioner as a defendant before the Indian Claims Commission has been doing for the past twenty years. The Commission's rules, to the extent they cover anything involving a jurisdictional interpretation of the 1946 Indian Claims Commission Act, are weighted in favor of the government. When it comes to set-offs and counterclaims, for example, those rules explicitly afford the government the right to set up any such claim as it may have where omitted through "oversight, inadvertence, or excusable neglect, or when justice requires" without relation to time. Rule 12(b), 25 CFR 503.12(b). For the government the awesome bar of August 13, 1946, is seemingly raised for the purpose of aiding the United States which, by the same reasoning as applied to the respondent in this case (if this Court should think such reasoning should apply), ought to be prohibited from seeking to recover counterclaims and set-offs after August 13, 1946. We feel certain that such a rule would not be acceptable to the government.

The reasoning of the court below was not "fallacious," as petitioner states, when the court opined that the government's failure to contest the substance of the accounting exceptions pointed directly to misconduct in its fiduciary capacity. A. 96; Br. 36, fn. 12. It is true that the government has continuously defended on jurisdictional grounds, has repeatedly stated that the exceptions were new general claims and also claimed that the original petition did not cover general or trust claims.[76] Since the funds here in question are by statute held in trust (*supra*, p. 52) and none of the exceptions requests an accounting of all Southern Ute funds, we are at a loss to grasp the significance of the petitioner's argument. The fact that it takes two other GAO reports to explain

[76] Tr. 91, October 8-9, 1963, Indian Claims Commission; Def. Br., Proposed Findings of Fact, etc., 1964, pp. 45-8.

omissions in the 1953 report for this case is some indication the court below was certainly not without justification in its observation (*supra*, pp. 60-2).

In order to compute what should have been done with the respondent's trust funds in the first place, and, if much of the work has not already been done (*supra*, pp. 60-1), in *determining* the obligations of conserving and making respondent's trust funds productive, the government will have to take into *consideration* the tribal moneys held in other interest and noninterest-bearing accounts apart from those here in question, even though the potential judgment would run only on the funds in this account. This consideration is necessary because of the government's persistent failure to account properly and completely in the first place, a failure which permeates the whole history of the Southern Ute accounts from at least 1895.

Disregarding its own recognition of the judgment factor in whether a claim is new and different, petitioner characterizes only as "novelty" the issue raised by the exceptions. Br. 37. We do not know what is new, different or novel in pointing out instances where the government failed to pay interest on money for Indian trust lands where an Act of Congress so required or in questioning specific classes of expenditures of those trust funds—all involving possible breaches of the fiduciary duty to conserve and make productive the trust funds in its custody. The *single* item petitioner cites as beyond the pleaded claim is an exception to pay interest on the "Proceeds of Labor" fund at 5% from 1892 rather than 4% from 1930. Br. 31, 38. We have shown these IMPL funds, although called miscellaneous revenues, are mainly proceeds from disposals or uses of interests in tribal lands through the leasing of different natural resources. *Supra*, p. 60. And, importantly it would seem, this specific exception on interest cited by the petitioner to prove its point was the one rejected by the Commission. A. 51-2.

If the case is handled by the Commission, with appropriate examination as to the items called to question by respondent's exceptions, the Congressional mandate will be fulfilled rather than suspended by the rule suggested by the petitioner. Br. 38. Otherwise, it is likely that the Court of Claims will inherit a group of accounting problems stemming from the government's conduct antedating August 13, 1946, all to be continued anew in that court—with only the time period changed—or the Indians will be denied their day in any court. These claims did not accrue after 1946 but are the continuing result of a chain of events started long before that date.

Whatever may be said about the "reasonable enforcement" of the limitations in the Indian Claims Commission Act, it is clear that the petitioner's argument fosters litigation rather than promotes the prompt settlement of the claims of the Indians. The Congressional impatience emphasized by the government would be perpetuated by a fresh filing in the Court of Claims of the same accounting cases pending in the Commission.

The government resorts to citations to the lengthy legislative effort leading to enactment of the Indian Claims Commission Act to establish what is not disputed —that Section 12 says the Commission was not to receive claims filed more than five years after August 13, 1946. Br. 33, fn. 8. Unfortunately for petitioner, that does not dispose of the matter. More important than the dozen or so bill references to antecedents of 25 U.S.C. 70k, is the purpose of the Act itself and the Congressional acknowledgement that for the first time since 1863,[11] all Indian tribes would be able to present their

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[11] By virtue of the Act of March 3, 1863, 12 Stat. 765-767, all claims of Indian tribes against the United States growing out of treaty obligations were barred from the Court of Claims, and only a special act of Congress permitting tribal suits avoided that jurisdictional bar. Indian tribes thus were denied a right com-

claims for redress to a tribunal. In presenting H. R. 4497, which became the Indian Claims Commission Act, to the 79th Congress, Congressman Jackson, manager of the bill, stated as follows: [78]

> "The Interior Department itself has suggested that it ought not to be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability. . . .
>
> "Let us pay up our debts. Let us pay our debts to the Indian tribes that sold us the land that we live on. They sold it for little enough, generally a few cents an acre.[79] Let us at least pay what we promised to pay, if we have not already done so, and let us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed. And let us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every kind, shape, and variety, so that this problem can truly be solved once and for all without coming back to haunt us or our successors in the form of further bills to extend the jurisdiction that this bill would confer on an Indian Claims Commission."

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monly recognized for every American citizen. *Legislative Materials*, p. 606; 92 Cong. Rec. 5318, May 20, 1946.

We adopt the same lead as used by the petitioner in its brief, footnote 8, page 33, referring to *Legislative Material*. We would add that Mr. Robert W. Barker, associated with Mr. Ernest L. Wilkinson at that time, is now a partner in Wilkinson, Cragun and Barker, the law firm which holds the attorney's contract with the Southern Ute Tribe, respondent before this Court.

[78] 92 Cong. Rec. 5312-3; *Legislative Materials*, p. 600. See *Klamath & Modoc Tribes* v. *United States*, 174 C.Cls. 483, 488-9.

[79] The Southern Utes have yet to receive anything for their property disposed of pursuant to the Act of 1895.

B. *The Right to Enter an Up-To-Date Judgment is an Intergral Part of the Indian Claims Commission's Jurisdiction*

Three interlocking grants and limitations of jurisdiction involving the Indian Claims Commission and the Court of Claims are presented in the petitioner's attack on the Commission's order for an up-to-date accounting. The first expressly removes from the Commission's consideration claims "accruing after August 13, 1946." 25 U.S.C. 70a. The second denies to the Commission, or any court or other administrative agency, the future consideration of any "claim existing" before August 13, 1946, but not presented to the Commission within the five-year filing period after that date. 25 U.S.C. 70k. And the third confers jurisdiction on the Court of Claims over any Indian tribal claim against the United States "accruing after August 13, 1946," in the same manner as any other litigant before that tribunal. 25 U.S.C. 1505. By merging or confusing the three, the government obliquely tells this Court that the Commission has no *power* over any governmental action after August 13, 1946. Br. 40-1.[80]

Petitioner's assertion that the Commission is barred by time and Indian claimants can go or could have gone to the Court of Claims with their post-August 13, 1946 accounting claims, ignores the very practical point that from at least 1956, the Commission, the Indian claimants, and evidently the government prior to this case, acceded to the decision of the Court of Claims in *Gila River Pima-Maricopa Indians* v. *United States*, 135 C.Cls. 180, 186; *Gila River Pima-Maricopa Indians* v. *United States*, 157 C.Cls. 941, hold-

[80] The government complains that the decision below exposes *new* instances of wrongdoing possibly allowing an additional measure of relief. But it also acknowledges that respondent is entitled to damages for any wrong accruing before 1946. Br. 40-1. The wrongs complained of herein accrued long before 1946 and they will continue until adjusted. They are not "new" claims which arose after 1946.

ing that the Commission's jurisdiction in an accounting extended all the way to the entry of final judgment and was not cut off on August 13, 1946. 135 C.Cls. 186. It seems late in the day for the government to challenge a construction of 25 U.S.C. 70a relied on for 15 years by the court which provides appellate review of the Commission's decisions and which categorized the rule as a good one.

In its 1956 opinion in *Gila River*, 135 C.Cls. 180, the Court of Claims construed 25 U.S.C. 70a to mean that the Commission was free to consider a claim arising prior to 1946 "where it is a continuing one." 135 C.Cls. at 185. It was clear that its jurisdiction was limited to claims accruing after 1946. It used as an example, a case where rent under a lease is payable before and after 1946. It followed the usual rule—"a court once having obtained jurisdiction . . . retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment." 135 C.Cls. 186. The court below and the Commission followed that reasoning in this case. A. 97.

What the court below did was to apply the elementary principle that once jurisdiction attaches, the court is entitled to see the matter to completion. *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U.S. 283, 291-2. Jurisdiction attached when the petition was filed on August 13, 1951, and the Commission's power extended to ordering an up-to-date accounting involving the 1953 GAO report and the items questioned by the respondent's exceptions.

The question of an up-to-date accounting (*i.e.*, a GAO report beyond June 30, 1951 in this case) was to the Commission one of first impression, even though it had the guidance of prior decisions of the Court of Claims and analogous matters from its own docket. A. 53. Turning to its own precedent on the matter of recoupment of gratuitous expenditures made by the government out of awards to Indian claimants under 25 U.S.C. 70a,

the Commission held that, if the government was entitled to deduct offsets beyond the cut-off date for filing claims as it had earlier held, *Kiowa, Comanche and Apache Tribes* v. *United States*, 5 Ind. Cl. Com. 72, 109-111, then the Indian claimants ought to be able to obtain an accounting beyond the same cut-off date. A. 53-55. For its ruling on the allowance of gratuities up to date, the Commission relied on *Sioux Tribe* v. *United States*, 105 C.Cls. 725, 811-12, where the Court of Claims permitted the government to recoup its gratuitous expenditures after the closing date of the jurisdictional act permitting the suit. A. 53-4. The Commission reasoned in this case that the parties should be treated equally. The Indians would get their up-to-date accounting and the government would be allowed offsets to the same date. A. 55.

One amazing fact in this case is the government's story that for more than 20 years the Department of Justice has erred in its defense of cases under the Indian Claims Commission Act; that public moneys were paid out on its recommendation involving litigation and settlements openly and fairly arrived at,[81] but that since these payments involved times and transactions after August 13, 1946, the adjustment of the Indian grievances and claims was, "to a slight extent, without juridical force." Br. 41. This confession, if truly representing the position of the United States, is dropped at the Court's door as the progeny of confusion. But

[81] At one point, the Department of Justice, through its Assistant Attorney Generals, was somewhat encouraged that the prospect of settling cases would hasten the disposition of Indian claims, thus responding to the Congressional impatience which is so dear to its present policy. See, *e.g.*, Indian Claims Commission Act Amendments, Hearing before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, United States Senate, on S. 307, 90th Cong., 1st Sess., February 15, 1967, pp. 63, 71, 73-4, 75; H. Rept. 132, 90th Cong., 1st Sess., Amending the Indian Claims Commission Act, p. 9, letter dated March 1, 1967, of the Acting Attorney General.

the government promises, not quite consistently, that it will not go back on those closed transactions and will in the future continue to honor such illegality. We assume this is not an attempt to reopen the door on settled cases (Br. 29, fn. 6), and find solace in the knowledge it would not succeed. Congress acted upon those judgments and appropriated money to pay them.

The government attacks the respondent's case as a dramatic "new accounting enterprise." Br. 41. We have several times demonstrated what is at stake accounting-wise—none of which is new, novel, or general. *Supra*, pp. 55-64. This entire jurisdictional discussion of petitioner is premised wholly on the erroneous assumptions that (a) everything about the respondent's exceptions created new claims, and (b) anything about an Indian claim which occurs after August 13, 1946, falls within the statutory bar to the Commission's power. Petitioner is wrong again—on both assumptions.

An Indian accounting claim, whether general or specific, involves a somewhat unique situation in that all of the information is available to the government and hidden from view of the Indian tribe, even though a fiduciary relationship toward its ward-like Indians is involved. The government collects their money; keeps their books; harbors their funds; and spends their money. If we agree with the observation of the petitioner, and perhaps the court below, that the Commission's rationale was novel, its result was an extremely practical construction of 25 U.S.C. 70a, and enabled it to rule wisely on the effect of the government's actions before it. The Commission's decision in this case sought to achieve the finality of purpose with which the Commission is charged in the first place. Its decision, encouraged by the Court of Claims in earlier cases and the parties before it through the years—one of which was always the petitioner—went farther to prevent the delay and obstruc-

tionism denounced by petitioner than it did to promote the refiling of accounting cases in the Court of Claims and thus extend and delay the conclusion of the Indian claims problem.

It is simple for the government to stand righteously on statutory bars backed by unquestioned case precedent cited in train. Br. 32-3. But in the decisional pit, the practical effect of the construction of a particular jurisdictional question, where the tribunal's power is not clearly barred, should be highly regarded. Considerations such as this led the Court of Claims to place first interpretation on the Commission to define its jurisdiction under 25 U.S.C. 70a. Petitioner's pronouncement that the Court of Claims is the appropriate forum in all claims matters post-1946 creates a host of procedural and substantive problems in adjudicating and trying a later case on the same accounting prior to the disposition of the primary claim by the Commission. Since the Court of Claims acts as the appellate tribunal over the Commission's decisions, the door is opened to conclude the subsequent and possibly less important matter on trial in the appellate court before the claim at the Commission, which also might be able to settle all such claims. Such a judicial merry-go-round is totally unacceptable, not only to the respondent here, but we suspect to the Commission, the Court of Claims, and the government on reflection.

Petitioner's ultimate point is the effect on post-1951 GAO reports for the forty-four general accounting claims allegedly pending before the Commission. Br. 41-2. Some of those Indian claimants have already raised the up-to-date issue in their claims, and others no doubt wait on the decision of this Court on the point since we understand that the petitioner has asked the Commission to halt all action on such pending accounting cases until the decision here comes down. Whether there are forty-four, which we doubt, or four, the point is important. Resolution of it should be handled as remedial legisla-

tion is handled. The Indian Claims Commission Act should be construed today as it was understood when passed. All claims of every kind, shape and variety were to be heard by the Commission and nothing was to come back to haunt Congress in the form of requests for action to extend the jurisdiction conferred on the Indian Claims Commission. *Supra*, pp. 71-2. Petitioner's theory of jurisdiction casts the brooding shadow of just such an event.

CONCLUSION

The decision of the court below, affirming the interlocutory order of the Indian Claims Commission, should be affirmed.

Respectfully submitted

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